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OCTOBER TERM, 1983

Supreme Court, U.S.
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NO. 83-5808

HENRY MARTINEZ PORTER,

Petitioner,

v.

W.J. ESTELLE, JR., DIRECTOR,
Texas Department of Corrections,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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Questions Presented

SELF-INCRIMINATION ISSUE

1. Whether the trial court's refusal in a Texas capital case to order a psychiatric competency examination unless the defendant, who had a lengthy history of severe mental disease (including schizophrenia) and irrational behavior, consented to the State's use of the results at the trial's penalty phase (where defendant's mental state and attitudes were likely to be at issue) violated petitioner's rights against self-incrimination and due process under the Fifth and Fourteenth Amendments.

FEDERAL HABEAS CORPUS PROCEDURE ISSUES

2. Whether the federal courts below misapplied this Court's ruling in Rogers v. Richmond, 365 U.S. 534 (1961) and related cases by holding that there was no need for a psychiatric competency examination, in reliance on a cold state trial record when the trial court record was inadequately developed due to the trial judge's misguided focus (at the prosecutor's behest) on the self-incrimination issue (see Question No. 1, supra).

3. Whether, in light of the undeveloped trial court record on the question of whether there was sufficient doubt as to petitioner's competence to require a psychiatric examination, the Court of Appeals' deference to a state appellate courts' "finding" of petitioner's "competence" contravened the standards of 28 U.S.C. §2254(d)(2), (3), (6) and (8).

4. Whether, in light of the undeveloped state trial court record, the federal courts' refusal to permit a habeas corpus evidentiary hearing means that Townsend v. Sain, 372 U.S. 293 (1963) is no longer good law or should be substantially modified.

5. Whether, in light of the trial prosecutor's concession that petitioner merited a competency examination and the State's subsequent repudiation of that position on appeal, this Court's strictures against "sandbagging" apply with equal force to state prosecutors as to defense counsel.

ENTITLEMENT TO A PSYCHIATRIC COMPETENCY EXAMINATION ISSUE

6. Whether the standards set forth in Pate v. Robinson, 383 U.S. 375 (1966) and Drope v. Missouri, 420 U.S. 162 (1975) for holding a psychiatric examination on a defendant's competence to stand trial should be clarified to require such an examination for a defendant diagnosed as schizophrenic, psychopathic, having suffered from hallucinations, and having escaped from a mental institution.

JUROR EXCLUSION ISSUE

7. Whether, in light of the confused and vacillating responses of certain prospective jurors, (a) their exclusion was consistent with the "unmistakably clear" standard for exclusion set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968); and (b) it was proper for the District Court and the Court of Appeals, in the absence of any specific factual or legal findings by the state trial judge, to rely on the cold state court trial transcript in deciding petitioner's claims based on Witherspoon.

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IN THE

SUPREME COURT OF THE UNITED STATES

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NO.

HENRY MARTINEZ PORTER,

Petitioner,

v.

W.J. ESTELLE, JR., DIRECTOR,
Texas Department of Corrections,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner Henry Martinez Porter, an indigent Texas state prisoner presently under sentence of death, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

Opinions Below

The opinion of the Court of Appeals (Rubin and Tate, JJ., Stagg, D.J.) (App., infra, pp. 1a-16a) is reported at 709 F.2d 944. The opinion of the District Court (App., infra, pp. 18a-26a) is unreported. The opinions of the Texas courts denying Porter's petition for a writ of habeas corpus (App., infra, pp. 27a-28a) are unreported. The opinion of the Texas Court of Criminal Appeals (App., infra, pp. 29a-41a) is reported at 623 S.W.2d 374. An earlier opinion of the Texas Court of Criminal Appeals (App., infra, pp. 42a-48a) is reported at 578 S.W.2d 742.

Jurisdiction

The judgment of the Court of Appeals was entered on July 18, 1983. Timely petitions for rehearing and rehearing en banc were denied on August 31, 1983 (App., infra, p. 17a.)* The jurisdiction of this Court is invoked under 28 U.S.C. §§1254(1) and 2101(c).

Constitutional Provisions and Statutes Involved

Fifth Amendment to the United States Constitution.

Sixth Amendment to the United States Constitution.

Fourteenth Amendment to the United States Constitution.

28 U.S.C. §2254(d).

The relevant texts of these provisions are reproduced at App., infra, pp. 49a-51a.

Statement of the Case

Henry Martinez Porter, a Texas state prisoner under sentence of death, seeks review of a judgment of the United States Court of Appeals for the Fifth Circuit affirming a judgment of the United States District Court for the Southern District of Texas, Corpus Christi Division (Hon. Hayden W. Head, Jr., J.), denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. §§2241 et seq.

A. Prior Proceedings

Petitioner was indicted on May 19, 1976 by a Tarrant County, Texas, grand jury for capital murder, based on the shooting of a Fort Worth, Texas police officer in November 1975. His initial conviction in Criminal District Court No. 4, Tarrant County, was reversed by the Texas Court of Criminal Appeals because certain reports

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* On September 26, 1983, the Court of Appeals stayed issuance of its mandate and continued the stay of Porter's execution presently in effect pending the timely filing and final disposition of a petition for certiorari by this Court.

relating to his mental illness and psychiatric difficulties were improperly admitted into evidence at that trial's penalty phase. Porter v. State, 578 S.W.2d 742 (Tex. Cr. App. 1979).

Within two months after reversal of his first conviction, Porter, an indigent represented by new trial counsel, was retried in the 214th Judicial District Court, Nueces County, Texas, after a change in venue from Fort Worth to Corpus Christi. Porter was again found guilty of capital murder and sentenced to death on May 29, 1979. His conviction was affirmed by the Texas Court of Criminal Appeals, with one judge dissenting. Porter v. State, 623 S.W.2d 374 (Tex. Cr. App. 1981). Certiorari was denied by this Court, with two Justices dissenting. Porter v. Texas, 456 U.S. 965 (1982).

After exhausting state remedies, Porter petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Texas, requesting an evidentiary hearing. The District Court (Head, J.) denied the petition on October 28, 1982, without oral argument or an evidentiary hearing. After the District Court granted a certificate of probable cause (28 U.S.C. §2253), the United States Court of Appeals for the Fifth Circuit (Rubin and Tate, JJ., Stagg, D.J.) heard argument and affirmed the District Court's judgment, including its denial of an evidentiary hearing, on July 18, 1983. Porter v. Estelle, 709 F.2d 944 (5th Cir. 1983). Petitions for rehearing and rehearing en banc were denied on August 31, 1983. Porter v. Estelle, 715 F.2d 577 (5th Cir. 1983).

B. The State's Case Against Porter

The State's case was based entirely on circumstantial evidence. No eyewitness to the shooting identified Porter. The critical issue at the

guilt-innocence phase of trial was whether the State proved, as required by Texas' capital-murder statute, that Porter knowingly or intentionally shot the police officer, or whether, as defense counsel argued (Tr. 2378, 2385, 2391), the death was an accident resulting from a scuffle between Porter and the policeman, whom the defense claimed had overreacted, and indeed shot Porter (See Tr. 2042-46, 2049) before being accidentally shot himself.* The State's basic argument against Porter was that the police officer's death had to have been knowingly or intentionally inflicted because Porter was suspected of having committed a recent armed robbery in the Fort Worth area (about which there was considerable trial testimony)** and thus shot the officer to avoid apprehension. Tr. 2335-38, 2352.

The physical evidence introduced at trial supported Porter's defense that the police officer died as a result of a struggle and accidental shooting. The lethal shot was not a straight-ahead assault; the police officer was six inches taller than Porter, but was killed by a bullet that, according to the State, "ranged downward and crossways."***

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* After his apprehension, and only after he had given a written statement to police, Porter was taken to a hospital for medical treatment of his wounds. (Trial Exhibit 8) (cf. Jackson v. Denno, 378 U.S. 368 (1964)) that was the subject of lengthy comment by the State on summation. Tr. 2342-43, 2353-54.

** The Court of Appeals' opinion rejected Porter's contention that admission of extensive and inflammatory testimony on this extraneous evidence (in the face of Porter's willingness to stipulate to the fact of the prior offense) mandated habeas relief, but conceded that "the extrinsic offense was arguably inadmissible ... to prove the accused's intent" and that there was "prejudicial use" of this evidence in "the trial court's instruction to the jury that it could consider it for that purpose [of showing intent]" and in "the prosecutor's repeated reliance upon it." 709 F.2d at 956.

*** See Brief of Respondent Estelle in the Fifth Circuit, at 3.

This evidence--the disparity in height between the two men and the angle of the bullet--plainly suggested that the police officer was bent over when he was shot, a position indicative of a struggle over the gun and an accidental rather than cold-blooded intentional killing.* That the State's case was not "open and shut" underscores the gravity of the errors discussed below, and calls into serious question whether this case legitimately falls within that small class of homicides in which capital punishment may be constitutionally appropriate.**

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* Moreover, even before he was apprehended, Porter had written a letter to the press stating that he had, in fact, shot the policeman -- hardly a statement of one seeking to avoid all responsibility. See State's Exhibits 21-23.

** In summation at the guilt phase of trial, the prosecutor sought to undercut Porter's post-arrest written statement (Exhibit 8) where he stated that his gun had fired accidentally in a scuffle with the dead policeman. The prosecutor stated, inter alia, "I don't vouch for the truth of this statement. It's not sworn. It's not under oath." Tr. 2342. See also Tr. 2353-54 ("And bear in mind that this statement is not sworn to. There is no notary on it. It was taken four days after the incident happened.") Porter, who had an appreciable criminal record (and indeed is under a life sentence regardless of the outcome of this case), did not testify at trial. The prosecutor failed to point out that there was no evidence that Porter had refused to swear to the truth of the written statement or had been offered a notary. Indeed, the statement (Exhibit 8) was taken by police, typed up, signed by a supplemental "witness to the signing by Mr. Porter" named Miss Odern, Tr. 2193, and said that the narration of events therein was "true." Compare United States v. Kennedy, 714 F.2d 968, 976-77 (9th Cir. 1983). The Court of Appeals rejected Porter's contention that the prosecutor's comments were fundamentally unfair and in violation of the doctrine of Griffin v. California, 380 U.S. 609 (1965). 709 F.2d at 958-59. The prosecution also made an unduly inflammatory summation on guilt/innocence (Tr. 2352): "'Kill the witnesses. Your chances are less of getting caught, criminals, if you kill the witnesses.' Why not just kill everybody when you commit a crime?" This, the prosecutor argued, was the message an acquittal would send to "other folks." Ibid.

C. The Failure to Grant Porter A Competency Examination

A critical constitutional issue arose when the trial judge, before testimony began, refused to order a requested psychiatric examination (much less a hearing) into Porter's competency to stand trial unless Porter was willing to permit--as the prosecutor demanded (Tr. 1865-66)--the examination and its fruits to be used against him at the penalty phase of his capital trial.* Porter's counsel would not consent to this open-ended use of the examination on the ground that it would violate Porter's right against self-incrimination. He stated:

> "Well, I'm just saying that it is my position that under Pate versus Robinson we have a right to have some kind of examination made without the hazard of causing our client to get the death penalty at some future time, and I just request the Court to enter an order so that we can and it will not be admissible at the hearing on punishment." Tr. 1864-65.

Since one of the questions to be resolved by a Texas jury at the penalty phase is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. 37.071(b)(2) (Vernon Supp. 1980), Porter's state of mind would be in issue on the question of whether he could be sentenced to death.** Because he would not consent to surrendering Porter's right not to have his own words used against him, Porter's counsel refused the examination. A copy of the relevant

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* Texas law prohibits use of evidence derived at a court-ordered psychiatric or competency examination at the guilt phase, Tex. Code Crim. Proc. 46.02(3)(g) (Vernon 1979).

** On this question, psychiatric testimony as to a defendant's state of mind and prognosis has been considered relevant. See, e.g., Estelle v. Smith, 451 U.S. 454, 457-58 (1981); Barefoot v. Estelle, __U.S.__, 103 S.Ct. 3383 (1983).

trial transcript pages on the competency is attached (App., infra, pp.52a-60a).

That there was a bona fide doubt as to Porter's competency to stand trial was not contested at trial; in fact, it was conceded by the prosecutor. In seeking such an examination, defense counsel (who had only recently become Porter's lawyer) cited to a report just disclosed by the prosecution indicating that Porter had suffered from hallucinations and had been in a Texas mental institution some years earlier. The prosecution conceded that "I think the way the case law is that [sic] both the Court and the defense counsel should have him examined." Tr. 1865. Before ruling against defense counsel's request that the examination and its fruits be precluded from use at the penalty phase, the trial judge made it clear that he did not disagree that a psychiatric inquiry into Porter's competency was appropriate: "If you want to let it be the record of the Court and used by either side, I will let him be examined." Tr. 1866. Nowhere did the trial judge indicate that a competency inquiry was unwarranted because he believed Porter was rational and capable of assisting in his defense.

Despite the truncated argument on competency, key facts, of which the trial judge was aware, demonstrated that there was a more than colorable question as to Porter's competency. First, as noted above, defense counsel was belatedly presented with a probation report from the late 1950's concerning Porter's history of prior psychiatric disorders.* This report indicated that when

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* According to the Texas Court of Criminal Appeals, 623 S.W.2d at 380, and the District Court on habeas review, the report was undated and unsigned. Apparently,

(footnote continued on next page)

Porter was a teenager, he had been committed to a state mental hospital because he had had hallucinations which, inter alia, had included seeing his deceased father and speaking to him. The report noted that he escaped from the mental hospital. As a clinical matter, it is well established that hallucinations are symptoms of serious mental disturbance due to organic brain disease, schizophrenia, or some other form of psychosis. See Kaplan, Freedman, Sadock, Comprehensive Textbook of Psychiatry, Vol. 2, Section 15.5 (3d ed. 1980). Significantly, in answer to defense counsel's question, "Is that all the record you may have in regard to his psychiatric and psychological problems..?", the prosecutor stated simply, "That and where he ran away from the hospital. That is all I know." Tr. 1636.

In fact, additional data was introduced at Porter's first trial (presided over by the same judge as the second trial) indicating that Porter was found to have grave mental problems as late as approximately two years before the crime for which he was on trial. At the first trial in 1976, this evidence included federal probation reports from 1973-74 which, as quoted by the Texas Court of Criminal Appeals (578 S.W.2d at 744-45), stated that Porter had a "psychopathic personality" and indications of paranoid schizophrenic behavior." Another report from that period (apparently undated), also quoted by the Texas appellate court (578 S.W.2d at 745), said that Porter "demonstrated 'paranoia'," expressed a "complete feeling of

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(footnote continued from previous page)

however, it was a probation report dated August 14, 1959, parts of which were subsequently introduced at the penalty phase of Porter's trial (State's Exhibit 35-A; Tr. 2425).

'helplessness' in regards to drug usage," admitted to "'uncontrollable' behavior," "demonstrates a number of serious mental and emotional handicaps" and had an "extremely poor" educational, social and familial history "apparently due to his serious narcotic addiction."*

Given Porter's psychiatric diagnoses in 1973-74 (the subject of a Texas appellate court opinion handed down approximately two months before Porter's second trial), it is understandable that the need for a competency examination (apart from the self-incrimination issue) was not challenged by the trial judge and that Porter's counsel was not pressed to litigate the issue further. In fact, no one at trial ever questioned the need for a competency examination--until, of course, an appeal was taken and the State, apparently concerned that its position on the self-incrimination issue was weak, reversed field, repudiated its trial prosecutor's concession and argued for the first time that there was no bona fide doubt as to Porter's competency to begin with.**

D. Exclusion of Prospective Jurors

Over defense counsel's objection, six prospective jurors (Ms. Herndon, Ms. Rice, Ms. Prue, Mr. Martinez, Mr. Vaughn, and Mr. Cantu) were excused purportedly on the ground that their responses on voir dire (in which the

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* Regardless of these reports' admissibility into evidence on the issues of guilt or innocence, they were clearly relevant to the issue of Porter's competency. E.g., Lokos v. Capps, 625 F.2d 1258, 1260 (5th Cir. 1980).

** On appeal to the Texas Court of Criminal Appeals, the State (represented, inter alia, by Rufus Adcock, Esq., the trial prosecutor who had conceded that a competency examination "should" be held) reversed field and argued that there was no need for the appellate court to reach the self-incrimination issue because no competency

(footnote continued on next page)

judge did not handle the questioning) indicated that their views against the death penalty were sufficiently strong to justify exclusion. See Tr. 273-76, 552-65, 609-19, 815-26, 1095-1112, 1161-71. For further discussion of these prospective jurors' comments, see Point IV, infra.

* * *

Reasons for Granting the Writ

I.

THE TRIAL JUDGE'S REFUSAL TO ORDER A COMPETENCY EXAMINATION UNLESS PETITIONER CONSENTED TO POSSIBLE USE OF THE RESULTS AGAINST HIM AT THE TRIAL'S PENALTY PHASE VIOLATED PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND AGAINST SELF-INCRIMINATION

By conditioning Porter's access to a competency examination (so quickly conceded by the prosecutor that defense counsel had no occasion to press the issue) on consent to possible use of the examination against him at the penalty phase, the trial judge violated Porter's Fifth Amendment right against self-incrimination. This Court has not squarely disposed of the issue of whether it is proper, without a clear waiver, to utilize the fruits of a competency examination against a criminal defendant on issues of guilt or sentence. Thus, this case presents the important question whether, if the ruling of the trial judge is correct, the right to a competency examination in appropriate circumstances may be curtailed--indeed,

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(footnote continued from previous page)

examination had been warranted in any event. The Texas appellate court, in rejecting Porter's claim, purported to apply the test "whether there is some evidence, a quantity more than none or a scintilla, that rationally may lead to a conclusion of incompetency," 623 S.W.2d at 380, but ignored the 1973-74 data that it had discussed in its prior opinion reversing Porter's initial capital conviction approximately 2 1/2 years earlier.

effectively erased--by threatening use of that examination against a defendant on the merits of his case.

This Court has long held that competency examinations are a critical means of ensuring that a defendant's constitutional right to stand trial only if competent,* is adequately safeguarded. E.g., Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966). More than that, the right of a defendant to have a Court determine his capacity to stand trial (i.e., his competency) has been held to be unwaivable. Pate v. Robinson, supra, 383 U.S. at 384.** If the trial judge's ruling was correct, it is clear that the right recognized in Bishop, Dusky, Pate and Drope can be readily subverted, as the Court of Appeals recognized in this case. 709 F.2d at 950.***

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* See Bishop v. United States, 350 U.S. 961 (1956); Dusky v. United States, 362 U.S. 402 (1960). In Dusky, this Court stated the test for competency to stand trial as follows: "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him." 362 U.S. at 402.

** In Pate v. Robinson, supra, 383 U.S. at 384, the Court held that the right to an appropriate competency inquiry could not be waived: "[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the Court determine his capacity to stand trial."

*** The Court of Appeals below correctly conceded (709 F.2d at 950) that Porter's right against self-incrimination was directly threatened by the prosecutor's insistence that the results of any court-ordered psychiatric competency examination be available for use against Porter at the penalty phase of trial. In Estelle v. Smith, supra, this Court squarely held that the right against self-incrimination was applicable to the attempted use of court-ordered psychiatric testimony at the penalty phase of Texas' capital trials. Moreover, counsel's refusal to let Porter be subjected to the risk that such an examination or its fruits could be used against him was a proper mode of preserving the issue for review. E.g., Maness v. Meyers, 419 U.S. 449, 463 (1975) (noting that forcing a witness to

(footnote continued on next page)

At least twice, this Court has recently spoken to the issue of whether it is constitutionally permissible to condition a defendant's exercise of one constitutional right on the waiver of another. In each instance, the Court indicated that such a procedure was unconstitutional. Thus, in Estelle v. Smith, supra, the Court held that it violated a defendant's right against self-incrimination to force him to submit to a competency examination without providing him with Miranda warnings. 454 U.S. at 462-69. Chief Justice Burger's majority opinion, however, did not stop at the question of whether Miranda warnings were all that were required to safeguard a

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testify in "reliance upon a later objection or motion to suppress could 'let the cat out' with no assurance whatever of putting it back"). Accord: Pillsbury Co. v. Conboy, ___ U.S. ___, ___, 103 S.Ct. 608, 617 (1983) ("We believe Conboy acted properly in maintaining his silence in the face of the District Court's compulsion order and by testing the validity of his privilege on appeal"); New Jersey v. Portash, 440 U.S. 450, 454-56 & n.5 (1979); Wardius v. Oregon, 412 U.S. 470 (1973); Brooks v. Tennessee, 406 U.S. 605 (1972).

Nor is there any doubt that had Porter subjected himself to a competency examination, the results might well have been devastating to him. On the one hand, it is possible that while the psychiatrist would have confirmed the mid-1970's diagnosis of psychosis and schizophrenia, he might nonetheless have found Porter to be in a state of remission so as to meet the constitutional competency standard of Dusky v. United States, supra. See Bruce v. Estelle, 536 F.2d 1051, 1063 (5th Cir. 1976) (noting that with respect to a schizophrenic, "[u]nless a psychiatrist had been at petitioner's side during the actual proceedings, there would be no truly reliable method of charting the possible changes in Bruce's mental state and establishing their effect on Bruce's legal competency"). On the other hand, as occurred in Estelle v. Smith, supra, 451 U.S. at 462-65, the psychiatrist's report, while conceding the gravity of Porter's mental illness, might have given critical support to the prosecutor's penalty phase argument on the "continuing threat to society" standard of Texas' death penalty procedure. As held in Estelle v. Smith, supra, 451 U.S. at 462, the Fifth Amendment protects a defendant "'from being made the deluded instrument of his own execution.'"

defendant's Fifth Amendment rights in the context of a competency examination. Going further, and seemingly recognizing that the need for a competency examination was unwaivable, the Chief Justice strongly suggested that, as sought here, a defendant in need of such an examination should be protected--by a de facto immunity grant*--from having the fruits of any such examination used against him for purposes of imposing sentence:

> "If, upon being adequately warned, respondent had indicated that he would not answer Dr. Grigson's questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose. In such circumstances, the proper conduct and use of competency and sanity examinations are not frustrated, but the State must make its case on future dangerousness in some other way." 451 U.S. at 468-69.

Accord: Battie v. Estelle, 655 F.2d 692, 701-02 (5th Cir. 1981).

This analysis is consistent with this Court's traditional approach to the right of self-incrimination, which, as held in Kastigar v. United States, 406 U.S. 441, 450 (1972), supports either silence (where there is a chance that speaking may aid in developing incriminating evidence) or compelled speaking (here, in response to a court-appointed psychiatrist's questions) under a "grant of immunity...coextensive with the scope of the privilege." See also Pillsbury Co. v. Conboy, supra, 103 S.Ct. at 613. Since an appropriate competency examination is non-waivable and must be ordered by a trial judge even if defense counsel does not request it, Pate v. Robinson, supra, 383 U.S. at 385-86; Tillery v. Eyman, 492 F.2d 1056 (9th Cir. 1974), the alternative of silence (i.e., refusal to submit

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* See Simmons v. United States, 390 U.S. 377, 394 (1968).

to the examination) should not be available when a trial judge believes that a competency examination is appropriate. Thus, immunity coextensive with the privilege (i.e., use and derivative use immunity) is the only proper alternative. This solution avoids imposing on defense counsel the Hobson's choice of either pressing for a competency examination and having its results used with devastating effect against his client or failing to litigate the issue of competence at all.

As the Court of Appeals noted (709 F.2d at 951), correct resolution of this issue is also dictated by Simmons v. United States, 390 U.S. 377 (1968), where this Court held that a defendant's testimony in support of his Fourth Amendment-based motion to suppress could not be used affirmatively against him at trial:

> "A defendant is 'compelled' to testify [in support of a pretrial motion] only in the sense that if he refrains from testifying he will have to forgo a benefit . . . . However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created . . . . In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another." 390 U.S. at 393-94 (emphasis added).

The result in this case should follow a fortiori from Simmons, which, after all, involved a right that was eminently waivable (i.e., the right to a suppression hearing).

Given Smith and Simmons, the trial court's failure to conduct the competency inquiry on the basis of defense counsel's refusal to allow the results to be used at the penalty phase raises an important question (particularly acute in capital cases where competency issues often

arise*) relating to reconciliation of the right against self-incrimination with the due process right (established in Pate and Drope) to an adequate determination of competency to stand trial.

In short, as recognized by the Court of Appeals (709 F.2d at 950-51), this case calls for resolution of important constitutional questions involving the interplay of the right to an adequate competency determination with the coextensive right against self-incrimination. That these questions arise in a capital case makes the need for their proper resolution especially compelling, not only because of the critical need in such proceedings to ensure that defendant's rights are safeguarded with scrupulous care, see, e.g., Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring); Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam); Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J., concurring), but also because of the perceived need to clarify the law for capital punishment cases to prevent undue frustration of the legislative will. See Barefoot v. Estelle, __U.S. __, __, 103 S.Ct. 3383, 3391 (1983).

II.

THE FEDERAL COURTS BELOW VIOLATED IMPORTANT PRINCIPLES GOVERNING EXERCISE OF THEIR HABEAS CORPUS JURISDICTION BY RELYING ON THE STATE TRIAL RECORD TO RULE THAT PORTER DID NOT WARRANT A COMPETENCY EXAMINATION AND BY REJECTING PORTER'S REQUEST FOR AN EVIDENTIARY HEARING WHERE THE STATE TRIAL COURT MADE NO FINDING ON HIS COMPETENCE AND WAS DIVERTED FROM FOCUSING ON THAT QUESTION BY THE SELF-INCRIMINATION ISSUE

Although the Court of Appeals appeared to agree with Porter's contention that the trial judge erred in ruling that the competency examination's results could be

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* E.g., Estelle v. Smith, supra, 451 U.S. at 457 n.1.

used against him, it nonetheless rejected Porter's appeal because "the showing [before the trial judge] did not raise a bona fide doubt under the circumstances as to defendant's competency to stand trial." 709 F.2d at 951. The trial judge, of course, made no explicit finding that Porter was competent, never suggested (contrary to the Court of Appeals' comment, 709 F.2d at 753) on the basis of his observation of Porter at his first trial (conducted three years previously) or during voir dire at the second trial that Porter appeared competent, and in no way challenged the need for a competency examination, as requested by defense counsel.*

For the Court of Appeals to have reviewed the record de novo and to have held (without the benefit of any factual or legal findings by the state trial court) that there was no bona fide doubt as to Porter's competency, raises important issues regarding the federal courts' in the exercise of their habeas corpus jurisdiction under 28 U.S.C. §§2241 et seq.

First, the state court record on which the Court of Appeals relied was inadequately developed--and very probably infected--by the trial judge's erroneous ruling (see Point I, supra) on the self-incrimination issue and by his failure to focus on the competency issue. Second, the deference the Court of Appeals gave to the ruling of the Texas Court of Criminal Appeals constituted a serious misapplication of the standards for such deference in 28 U.S.C. §2254(d). Third, the decisions of the District

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* Thus, this is not a case where any lower court made a finding as to either Porter's or any other witness' demeanor or credibility that is now sought to be challenged on habeas review. Compare Maggio v. Fulford, __U.S.__, 103 S.Ct. 2261 (1983) (per curiam); Marshall v. Lonberger, __U.S.__, 103 S.Ct. 843 (1983).

Court and the Court of Appeals that there was no need for an evidentiary hearing on whether a competency inquiry was required call into question the vitality of the ruling in Townsend v. Sain, 372 U.S. 293 (1963) on the standards--which are satisfied in this case--for conducting an evidentiary hearing in federal habeas cases. Fourth, the Court of Appeals' ruling squarely presents the question whether this Court's strictures against "sandbagging" in Wainwright v. Sykes, 433 U.S. 72, 89-90 (1977); Engle v. Isaac, 456 U.S. 107, 129 n.34 (1982) apply as much to state-court prosecutors as to state-court defense counsel.

A. The Court of Appeals' Ruling is in Conflict With This Court's Holdings in Rogers v. Richmond and Subsequent Cases

Repeatedly, this Court has held that where the trial court applies an erroneous standard of law in dealing with a fact-related issue (here, Porter's entitlement to a competency examination), reversal is required so that the correct legal standard may be applied and so that the facts may be properly developed without being infected by analysis under an improper legal standard. E.g., Rogers v. Richmond, 365 U.S. 534, 542-48 (1961); Pate v. Robinson, supra, 383 U.S. at 386-87; Groppi v. Wisconsin, 400 U.S. 505, 508 n.3 (1971). See also Townsend v. Sain, supra, 372 U.S. at 315 n.10 ("[U]nder Rogers v. Richmond, a new trial is required if the trial judge or the jury, in finding the facts, has been guided by an erroneous standard of law"). Given the Court of Appeals' ruling, this case poses the question whether the rule of Rogers and successor cases should be maintained.

In Rogers, this Court held that it was improper for a federal habeas corpus court to rely on a cold state court trial record to decide the issue of the voluntariness of a defendant's confession where the trial record--

and the trial judge's analysis--had been infected by the trial judge's legally erroneous focus on the likely truth or falsity of the confession. 365 U.S. at 545. Similarly, Pate relied on Rogers in rejecting a federal appellate court ruling on the merits of petitioner's claim of incompetence based simply upon review of the state court record. 383 U.S. at 386. In Groppi, the Court, in reversing a conviction, rejected the State's argument that petitioner had made an insufficient showing of community prejudice in a case testing the validity of a venue-change statute; it noted that the trial court's ruling in effect prevented the merits of the community prejudice issue from being actually litigated. Precisely the same defect occurred in this case.

Here, the trial judge made a fundamental error of law on the self-incrimination issue, which was the sole reason that no competency examination occurred. On the issue of Porter's competence, the trial judge articulated no legal standard at all, made no factual findings, asked no factual questions (nor did the prosecutor) and merely stated "a willingness to order" a competency examination. 709 F.2d at 953. Compare LaVallee v. Delle Rose, 410 U.S. 690 (1973) (per curiam).

Under the circumstances, there was no occasion for defense counsel to press the issue of Porter's incompetence for the simple reason that it was conceded by the prosecutor and never challenged by the trial judge (who, after all, had long experience with Porter). The only issue actually litigated at that time was whether Porter's right against self-incrimination precluded the prosecutor's contemplated use of the psychiatric examination. Had any question been raised over whether a competency examination was required, defense counsel could have supplemented the

record. That he did not, and that the trial record on the competency issue is so slender, merely demonstrates that the parties--and the trial judge--became sidetracked on the self-incrimination issue.

Justice Frankfurter's opinion for the Court in Rogers v. Richmond, supra, establishes that, as a matter of proper habeas corpus procedure, it was error for the federal courts below to rely on the slender state trial-court record in deciding the question of Porter's entitlement to a competency examination. As held in Rogers:

> "Nor . . . can . . . findings [based on the original trial court record] be fairly looked to for the 'facts,' since findings of fact may often be . . . influenced by what the finder is looking for. Historical facts 'found' in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusions if and merely because a correct standard is later applied to them." 365 U.S. at 547.

This case even more compellingly calls for review (and reversal) than Rogers. The trial judge made no finding against Porter on the issue of a competency examination. Compare Maggio v. Fulford, supra; Drope v. Missouri, supra.* Thanks to the prosecutor's concession and his erroneous diversion of defense counsel's (and the trial judge's) focus to the self-incrimination point, the trial record remained (and still remains) in an undeveloped state. For the reviewing courts to seize on the necessarily truncated set of materials before the trial judge (none of which related to witness' credibility or

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* Indeed, not even the Texas Court of Criminal Appeals made a factual finding as to Porter's actual demeanor and state of mind at the time the examination was requested. Thus, there is no basis for deferring to the finding of any state court in this case under 28 U.S.C. §2254(d) and such cases as Sumner v. Mata, 449 U.S. 539 (1981) (Sumner I) and Maggio v. Fulford, supra.

demeanor) as a basis for sustaining the trial judge's ruling on an alternative ground (i.e., that there was no doubt as to Porter's competence to begin with) is precisely what this Court held impermissible in Rogers.

B. The Court of Appeals' Ruling is in Conflict With 28 U.S.C. §2254(d)(2), (3), (6) and (8)

In reaching the merits of the bona fide doubt issue without ordering amplification of the record in an evidentiary hearing, the Court of Appeals appeared to defer (709 F.2d at 953) to the holding of the Texas Court of Criminal Appeals in Porter v. State, supra, 623 S.W.2d at 380-81, that Porter had failed to demonstrate that there was a sufficient basis for a psychiatric examination on his competency to stand trial. This deference was inappropriate and raises an important issue of habeas corpus judicial administration--namely whether the lower courts are correctly applying the standards of 28 U.S.C. §2254(d) regarding deference to state court findings. Here, at least four of the eight standards of 28 U.S.C. §2254(d)--subsections (2), (3), (6) and (8)--were met; thus, any such deference was erroneous. As a result, this case affords this Court an opportunity to elaborate on requirements of § 2254(d) that were not touched on in such cases as Sumner I, supra; Sumner v. Mata, 455 U.S. 591 (1982) (per curiam) (Sumner II); Marshall v. Lonberger, supra; and Maggio v. Fulford, supra.

First, "the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing." 28 U.S.C. §2254(d)(2). The Texas trial judge employed no fact-finding procedure at all on the issue of whether Porter was entitled to a competency examination. Counsel was simply given a copy of a belatedly-disclosed report on Porter's hallucinations, mental hospitalization

(and escape therefrom) (Tr. 1633-36) and asked for a competency examination--to which the prosecutor consented. Tr. 1865. Thereupon, the parties became embroiled over whether the examination could be used against Porter at the trial's penalty phase. Tr. 1865-66. The upshot was that the trial court simply ruled: "Well, I don't follow what you are saying, but I will deny [defense counsel's] request. If you want to let it be the record of the Court and used by either side, I will let him be examined." Tr. 1866. On direct review in the Texas Court of Criminal Appeals, there was no independent fact-finding procedure; that Court merely reviewed the cold trial-court record, ignoring the 1973-74 reports that Porter was diagnosed, inter alia, as "paranoid schizophrenic" and "psychopathic." See 623 S.W.2d at 380-81. Thus, Porter never had a "full" hearing on whether he was entitled to a competency examination, much less a "fair" one.* Likewise, the Texas courts on collateral review did not go beyond the trial record. While the record appears sufficient to support a finding that a competency hearing was constitutionally required, see Point III, infra, it was neither "full" nor "fair" enough to deny Porter's claim.

Second, "the material facts were not adequately developed at the State court hearing." 28 U.S.C. §2254(d)(3). As noted above, the facts relating to Porter's possible lack of competence were not "developed" at all before the trial judge. Neither the trial judge nor

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* The conclusion that the fact-finding procedure employed on the competency examination issue was unduly truncated is supported, as noted above, by the fact that neither the parties nor the trial judge, nor the Texas Court of Criminal Appeals discussed the reports admitted at Porter's first trial that as of 1973-74 he was diagnosed as "paranoid schizophrenic" and "psychopathic." See Statement of the Case, supra.

the Texas Court of Criminal Appeals (nor, for that matter, the Texas courts on collateral review) even mentioned the data introduced at Porter's first trial concerning his diagnosis as late as 1973-74 as a "paranoid schizophrenic" with a "psychopathic personality" and feelings of "helplessness" related to his heroin addiction. Given the well-established view that these conditions can at any time make such a person completely irrational and incapable of understanding judicial proceedings, see Bruce v. Estelle, supra; Acosta v. Turner, 666 F.2d 949, 954-55 (5th Cir. 1982), the respective state courts' failure to focus on this data means that "the material facts were not adequately developed."

Third, "the applicant did not receive a full, fair, or adequate hearing in the State court proceeding." 28 U.S.C. §2254(d)(6). The crucial question of Porter's entitlement to a competency examination received only perfunctory attention at trial due to diversion of the parties (and the trial judge) to the self-incrimination issue. If the truncated colloquy in this case concerning the need for an examination is considered "full," "fair," or "adequate" to develop and decide the relevant factual and legal issues, then §2254(d)(6) is effectively a dead-letter. The Texas appellate court did no more than rely on the trial transcript. The Texas state court collateral opinions did not mention the issue. Thus, the Texas post-trial proceedings were inadequate to remedy the patent defects in the trial judge's consideration of the competency issue.*

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* After the trial judge refused Porter's request to preclude use of any competency examination against him at the penalty phase of trial, the issue of Porter's competency was not thereafter addressed at trial. Of course, given the trial judge's ruling on the self-incrimination issue, it would have been futile to have raised the issue. Nor did the trial judge make any findings on his demeanor or behavior

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Fourth, any "factual determinations" of the state courts in this case were "not fairly supported by the record." 28 U.S.C. §2254(d)(8). The trial court made no factual determination at all concerning Porter's competency and the Texas appellate court relied on the silence of the trial record and its own legal conclusion as to the impact of the belatedly disclosed report from the 1950's. 623 S.W.2d at 379-81. Moreover, the Texas appellate court ignored the evidence set forth in its earlier opinion regarding diagnoses of Porter's severe mental disease in the 1970's. For a federal court to defer to the Texas courts' skewed analysis of the competency issue--and those courts' failure to apply correct legal standards--is an unwarranted extension of this

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at trial. The Texas Court of Criminal Appeals seized on this point, noting that "appellant's behavior throughout the trial was not such as to raise any issue of his incompetency." 623 S.W.2d at 380. Porter, however, did not testify at his 1979 trial and any observations of him merely sitting at counsel table would have been of limited utility at best. In any event, the trial judge made no findings based on Porter's demeanor. The Texas appellate court's discussion thus misses the point of the competency issue, which is that incompetence is not necessarily manifested by in-court outbursts. Indeed, in Pate v. Robinson, supra, there was no evidence of in-court bizarre behavior by the defendant. See 383 U.S. at 385; id. at 390-91 (Harlan, J., dissenting). Moreover, it is well-established that with a person diagnosed as having had hallucinations and as schizophrenic (as Porter was), a cold trial transcript "cannot reveal... mood and other indicia of a mental state and certainly cannot pick up subtle but crucial changes in petitioner's demeanor," and, accordingly, "[u]nless a psychiatrist had been at petitioner's side during the actual proceedings, there would be no truly reliable method of charting the possible changes in [his] mental state and establishing their effect on [defendant's] legal competency." Bruce v. Estelle, supra, 536 F.2d at 1062-63. In Drope v. Missouri, supra, 420 U.S. at 180, the Court also indicated that in-court overt behavior was not dispositive on the competency issue: "There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." Thus, the Texas appellate court's observation on Porter's "behavior" is entitled to no deference on the mixed-fact-law question of his possible lack of competence. See Sumner II, supra, 455 U.S. at 597.

Court's recent rulings on §2254(d)(8) in Sumner I; Sumner II; Marshall v. Lonberger, supra; and Maggio v. Fulford, supra.

C. The Courts Below Ignored the Mandate of Townsend v. Sain By Refusing to Order an Evidentiary Hearing on the Issue of Whether There Was a Bona Fide Doubt as to Porter's Competency to Stand Trial

This case also presents the question of the continued vitality of the standards set forth in Townsend v. Sain, 372 U.S. 293 (1963) for determining when an evidentiary hearing in a federal habeas proceeding is mandatory.* In refusing even to conduct an evidentiary hearing on the issue of whether Porter warranted a competency examination, the District Court and Court of Appeals ignored the central holding of Townsend:

> "The appropriate standard [governing when a federal habeas evidentiary hearing is required] is this: Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding. In other words a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts." 372 U.S. at 312-13.

In Texas collateral proceedings, Porter received no evidentiary hearing: his petitions for habeas corpus, including requests for an evidentiary hearing, were rejected. At trial and on direct appeal, there was no full and fair evidentiary hearing on issues relating to his

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* It has been assumed that the Townsend standards for holding an evidentiary hearing remain viable even after the 1966 amendments to the habeas corpus statute. See P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 1505 (2d ed. 1973); LaVallee v. Delle Rose, supra, 410 U.S. at 690 n.2 (Marshall, J., dissenting).

competency. Since Porter's request for a competency examination was never challenged, the issue was not "litigated" or "heard" in any meaningful sense. Indeed, since the need for a competency examination was conceded by the prosecutor (Tr. 1865), and, as noted by the Court of Appeals, the trial judge indicated "a willingness to order one if the defendant requested one," 709 F.2d at 953, the issue was effectively stipulated out of the case before it could be joined.

The Court of Appeals' and District Court's rulings are in conflict with Townsend v. Sain, supra, on additional grounds. Townsend also holds that a federal habeas evidentiary hearing must be granted in any of the following circumstances:

> If "(1) the merits of the factual disputes were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing." 372 U.S. at 313.

Standard No. 1 in Townsend is satisfied (as the Court of Appeals concedes with respect to the state trial court, 709 F.2d at 953-54). As Townsend holds: "[I]f no express findings of fact have been made by the state court, the District Court must initially determine whether the state court has impliedly found material facts." 372 U.S. at 314. Here, the state trial judge, according to the Court of Appeals, neither expressly nor impliedly found that Porter was competent or possibly incompetent; he simply conceded the issue. That the Texas appellate court purported to reach the merits of the issue relating to

Porter's entitlement to a competency examination does not mean that an evidentiary hearing should not be held under this standard. In discussing Standard No. 1, Townsend made it clear that its reference to a "state hearing" meant the "state trier of fact," 372 U.S. 314-15, not a state appellate court applying (as here, 623 S.W.2d at 380) an "abuse of discretion" standard of review. Moreover, Sumner I nowhere suggests that the phrase "hearing" in §2254(d) has the same meaning as "state hearing" as used in Townsend. This case thus presents the Court with an opportunity to clarify that issue. Several lower courts, moreover, have assumed that findings of state appellate courts are no substitute for a state trier of fact's failure to resolve the issues. E.g., United States ex. rel. Sullivan v. Cuyler, 530 F.Supp. 1353, 1360 (E.D. Pa. 1982); Guice v. Fortenberry, 661 F.2d 496, 506-07 (5th Cir. 1981); White v. Finkbeiner, 570 F.2d 194, 201 (7th Cir. 1978).

Moreover, under Standard No. 1 in Townsend, an evidentiary hearing is required where it is not possible to "reconstruct the findings of the state trier of fact . . . . Reconstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim. Under such circumstances the District Court cannot ascertain whether the state court found the law or the facts adversely to the petitioner's contentions." 372 U.S. at 314. Townsend further states:

> "[E]ven if . . . the state trier of fact utilized the proper standard, a hearing is sometimes required if his decision presents a situation in which the 'so-called facts and their constitutional significance [are] . . . so blended that they cannot be severed in consideration' .... Unless the U.S. district judge can be reasonably certain that the state trier would have granted

> relief if he had believed petitioner's allegations, he cannot be sure that the state trier in denying relief disbelieved these allegations .... Under these circumstances it is impossible for the federal court to reconstruct the facts, and a hearing must be held." 372 U.S. at 315-16.

Here, the state trial court disposed of Porter's request for a competency examination by focusing erroneously on a legal issue--the self-incrimination point--unrelated to Porter's entitlement to the examination, made no findings (either of historical fact or mixed law-fact) against Porter on the competency issue, never articulated any legal standard for considering the competency issue, and, in sum, made the task of "reconstruction" on federal habeas review impossible.

As for Standard No. 2 in Townsend, there is ample basis for concluding that in light of Porter's diagnosis as schizophrenic and psychopathic in 1973-74 (not to mention the data on hallucinations and mental hospitalization from some years earlier), there was more than sufficient basis to justify psychiatric inquiry into his competency. See, e.g., Drope v. Missouri, supra; Lokos v. Capps, supra, 625 F.2d at 1261 ("Did the trial judge receive information which, objectively considered, should reasonably have raised a doubt about defendant's competency and alerted him to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense[?]"); see also Point III, infra. Moreover, the Texas courts ignored the important 1973-74 data on Porter's recent diagnoses and pessimistic prognosis.

Because the trial judge engaged in no fact-finding on the competency examination issue--assuming that the Court of Appeals is right in its characterization of what

occurred--Standard No. 3 is satisfied. As stated in Townsend: "Even where the procedure employed does not violate the Constitution, if it appears to be seriously inadequate for the ascertainment of the truth, it is the federal judge's duty to disregard the state findings and take evidence anew." 372 U.S. at 316. Because he was side-tracked on the self-incrimination issue, this is a case where the state judge's mode of proceeding was grossly inadequate for the ascertainment of whether there were relevant facts militating in favor of a competency examination. The same is true, as noted above, of the Texas appellate and collateral review proceedings. For these reasons (and also because of the prosecutor's concession) Standards No. 5 and 6 are satisfied on their face.

Finally, as stated in Townsend: "If, for any reason not attributable to the inexcusable neglect of petitioner, see Fay v. Noia . . . evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled." 372 U.S. at 317. Here, due to the prosecutor's concession and the parties' concentration on the self-incrimination issue, no Texas court considered, much less had a chance to have developed, crucial evidence relating to Porter's diagnoses in 1973-74 as paranoid schizophrenic, psychopathic, and suffering from serious mental and emotional handicaps.* Thus, it was erroneous for the federal courts (which might have been able to hear, inter alia, testimony from the authors of the 1973-74 probation reports, from prison personnel who dealt with

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* Even the Court of Appeals conceded that this data was relevant on the competency examination issue. 709 F.2d at 951.

Porter, from his trial counsel, family, etc.) to have denied Porter's request for an evidentiary hearing.*

In sum, the refusal to grant Porter an evidentiary hearing raises an important question for capital and non-capital cases regarding the federal courts' administration of its habeas corpus jurisdiction as well as the continuing vitality of Townsend v. Sain. Such hearings relating to competency are not novel. See Lokos v. Capps, supra, 625 F.2d at 1268 n.5. If the Townsend standards are no longer good law or are in need of significant modification, principles of sound, efficient judicial administration require this Court--given the heavy burden of habeas cases on federal dockets at all levels--to clarify that issue promptly.

D. This Case Presents the Question Whether the Court's Admonitions Against Sandbagging at the State Trial Court Level Apply as Much to Prosecutors as They Do to Defense Counsel

This Court has repeatedly admonished state court defense counsel to avoid what has been characterized as the technique of "sandbagging," i.e., failing to raise an objection or issue at trial in order to expand a defendant's repertoire for appellate or collateral review. Sandbagging, as noted in Wainwright v. Sykes, 433 U.S. 72, 89-90; Engle v. Isaac, 456 U.S. 107, 128-29 & n.34 (1982), impermissibly interferes with the orderly conduct of state-court proceedings by forcing appellate or collateral review courts to resolve issues without the benefit of

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* Finally, Townsend notes that even where none of its six standards are satisfied, federal district courts retain "sound discretion, to receive evidence bearing upon the applicant's constitutional claim." 372 U.S. at 318. This Court has not clearly articulated the standard for reviewing a lower court decision not to exercise that discretion. Given the defects in the manner in which Porter's competency claim was treated in the Texas courts, this is a compelling case for this Court to articulate such a standard.

trial-level rulings that, had the parties promptly sought them, would have either mooted the issues or, at the very least, provided an adequate trial-level record for subsequent resolution. The about-face of the Texas prosecutors--first conceding the need for a psychiatric competency examination and, then, in every subsequent appellate or collateral proceeding, insisting that there was no doubt as to Porter's competency sufficient to require an examination--is an egregious instance of sandbagging. Due to the prosecutor's concession at trial, defense counsel was deterred from pressing the need for a competency examination on factual and legal grounds; no sensible trial counsel respectful of a court's time would do anything but accept the concession. Likewise, the trial judge was diverted from focusing on the issue and insisting on a developed record; few trial judges can be expected to overrule what counsel present as a de facto stipulation. In other words, the prosecutor deliberately by-passed an opportunity to litigate the competency examination issue.

The upshot of the prosecutor's behavior is that the reviewing courts were put in the position that Sykes and Engle warned against, i.e., having to decide a question that could have been fully litigated at trial, but was not developed due to trial counsel's conscious choice.

In sum, this case presents the question of whether this Court's admonitions in Sykes and Engle apply as fully to the prosecution as to the defense. Accord: Steagald v. United States, 451 U.S. 204, 211 (1981) ("the Government, through its assertions, concessions, and acquiescence, has lost its right to challenge petitioner's assertion....").
As a matter of equity, it appears inconceivable that prosecutors should be freer to raise new issues on appeal

and collateral proceedings than are defense counsel.* If the strictures in Sykes and Engle are inapplicable, then the administration of federal habeas corpus jurisdiction must of necessity become even more complex than it already is. Prosecutors will be free to litigate on appeal and in collateral proceedings issues that they intentionally relinquished at trial, see Johnson v. Zerbst, 304 U.S. 458, 464 (1938), a particularly unfortunate technique when relevant proof not forced to the surface and probed at trial may become stale. Moreover, if the conduct of this litigation endorsed by the Court of Appeals is sustained, see 709 F.2d at 754 (referring to "the state's mistaken concession"), then a further question arises as to whether the overriding Townsend standards relating to "full and fair fact hearing," 372 U.S. at 313, can be subverted by the same sort of deliberate bypassing techniques that are prohibited when utilized by defense counsel. See Fay v. Noia, 372 U.S. 391, 438 (1963); Wainwright v. Sykes, supra, 433 U.S. at 83.

III.

THIS CASE REQUIRES THE COURT TO CLARIFY THE STANDARDS OF PATE AND DROPE AS THEY APPLY TO A CRIMINAL DEFENDANT WITH A LENGTHY PRE-TRIAL HISTORY OF MENTAL ILLNESS INCLUDING SCHIZOPHRENIA

Both Pate v. Robinson, supra, and Drope v. Missouri, supra, considered the issue of what circumstances require a state trial judge under the Due Process Clause to make "further inquiry" into a defendant's mental condition so as to ensure that the constitutional competency standard

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* We know of no rule of Texas law that discriminates in favor of prosecutors and against the defense in this regard. Of course, if such a rule existed, it would raise a serious issue under the Equal Protection Clause.

of Dusky v. United States, supra, is satisfied. This case presents the question--not squarely decided in Pate or Drope--whether a preliminary showing of a long history (from at least 1957 to at least 1974) of serious mental disease, including hallucinations, mental hospitalization (and escape therefrom), diagnoses as psychopathic and paranoid schizophrenic, is sufficient as a matter of federal constitutional law to trigger the "further inquiry", particularly where such inquiry is specifically requested by counsel.* Notwithstanding the wholly inadequate state court record (see Point II, supra), it is respectfully submitted that there was nonetheless sufficient data before the trial judge to have required the "further inquiry" (here, a requested psychiatric examination) mandated by Pate and Drope.

Neither Pate nor Drope stated a bright-line test for precisely determining when such an inquiry is constitutionally mandated. Pate involved a defendant with a lengthy history of bizarre behavior (including episodes of irrational violence) and past mental hospitalization,** but whose record included a psychiatric report a few months before trial that "Robinson knew the nature of the charges against him and was able to cooperate with counsel."*** Robinson's mental hospitalization apparently occurred

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* As Chief Justice Burger stated in Drope:

> "[A]n expressed doubt [by counsel as to his client's competence] by one with 'the closest contact with the defendant' (citation omitted) is unquestionably a factor which should be considered." 420 U.S. at 177 n.13.

** 383 U.S. at 378-83.

*** Id. at 383.

several years before the crime for which he was charged.* There was no suggestion that at or near the time of trial he was suffering from lack of competency or that his mental disease was in an active or exacerbated state. At trial, it appeared that he showed "mental alertness and understanding."** Nonetheless, applying a "bona fide doubt" standard, 383 U.S. at 385, this Court held that despite Robinson's demeanor at trial, "[his] history of pronounced irrational behavior" compelled, as a matter of constitutional law, a hearing as to his competence (which the trial judge had not granted). 383 U.S. at 385-86.

Drope held that a trial judge violated the Due Process Clause by failing to order a psychiatric examination with respect to a defendant's competence to stand trial where he had previously been diagnosed as "psychopathic,"*** had received psychiatric care, and had attempted suicide in the middle of trial.**** Noting that the constitutional nature of the mixed fact-law question of the defendant's possible incompetence required de novo review of the record, 420 U.S. at 174-75, this Court held that even though Drope did not suffer from "delusions" or "hallucinations," his behavior--including his difficulty "relating," his suicide attempt, and his irrational

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* Id. at 379-382.

** Id. at 385; see also id. at 390 (Harlan, J., dissenting) (pointing to "colloquies between Robinson and the trial judge which undoubtedly permitted a reasonable inference that Robinson was quite cognizant of the proceedings and able to assist counsel in his defense").

*** 420 U.S. at 164-65 n.1.

**** Id. at 166.

pre-trial behavior toward his wife*--compelled the conclusion that there was "sufficient doubt of his competence to stand trial to require further inquiry on the question." 420 U.S. at 180. The Court noted that the defendant's "evidence of irrational behavior prior to trial was weaker" than in Pate, but that his behavior once trial commenced showed "a rather substantial degree of mental instability." 420 U.S. at 181.

Summing up the Court's approach to mandatory competency inquiries, Drope held:

> "The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." 420 U.S. at 180.

Neither Drope nor Pate squarely analyzes the import of pre-trial diagnoses of serious mental disabilities, such as schizophrenia or hallucinations, that may make a person at times utterly incompetent while at other times (i.e., if the defendant is in a state of remission) may not affect his ability rationally to understand the proceedings and to assist in his own defense.

This case thus calls on the Court to decide whether the "bona fide" or "sufficient" doubt standard, as set forth in Pate and Drope, should be so narrowly interpreted as to preclude competency examinations of defendants with serious prior-diagnosed mental illness

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* Unlike Porter, the defendant in Drope was evidently not incarcerated just before or during trial before his attempted suicide. See 420 U.S. at 166.

merely because they are not acting in an overtly bizarre manner at trial. Pate, to be sure, strongly suggests that a serious history of mental disease, even in the face of alert behavior at trial, nonetheless requires "further inquiry." Here, by contrast, there was no finding that Porter acted in an alert, understanding manner at his 1979 trial. (Indeed, as noted at oral argument before the Court of Appeals, Porter's trial counsel found him uncommunicative). Like the defendant in Pate, moreover, Porter had a long history of irrational behavior (e.g., heroin addiction, several non-violent crimes, and a recent armed robbery), had been hospitalized in and escaped from a mental institution, had hallucinations (an indication of psychosis or organic brain disease) and was diagnosed several years before his 1979 trial as psychopathic and paranoid schizophrenic. Neither the trial judge nor any reviewing court made any effort to probe those diagnoses, to delve into Porter's hospitalization or counseling experiences, or even to consult prison officials who had first-hand experience with him.

Several lower courts have recognized that diagnosis of serious mental illness such as schizophrenia, which relates to perception and cognition, necessarily raises a question as to whether a defendant at any particular time is rational, capable of understanding the proceedings and their significance, and of aiding his attorney. See, e.g., Lokos v. Capps, supra, 625 F.2d at 1260-61, 1264 (competency examination unconstitutionally denied where a defendant had been diagnosed ten years earlier as "schizophrenic" and "paranoid," hospitalized,

and released with the conclusion that "there was not very much evidence of an active psychotic process").*

Moreover, lower courts have recognized that diagnosed schizophrenics are necessarily capable of fluctuating between "remission" and lack of "capacity." E.g., Acosta v. Turner, supra, 666 F.2d at 954. It has been recognized that schizophrenics' "mental states can change rapidly" and without a psychiatric examination at the time a competency issue is raised, there is "no truly reliable method of charting the possible changes in...mental state and establishing their effect on...legal competency." Bruce v. Estelle, supra, 536 F.2d at 1062-63. Accord: Rose v. United States, 513 F.2d 1251, 1257 n.5 (8th Cir. 1975) ("the mental condition of an accused may change drastically in a matter of months"); Rand v. Swenson, 501 F.2d 394, 395 (8th Cir. 1974).

The courts below ignored the teaching of these cases. They gave no weight to the diagnoses that Porter seemed paranoid schizophrenic and psychopathic and did not consider that the diagnoses meant there was an obvious question as to his ability to think rationally and relate to his current environment. Contrary to Pate, the courts below gave undue weight to the fact merely that there was no evidence of overt bizarre behavior at Porter's trial--a fact which does not speak to the question of Porter's actual capacity to have a rational understanding of

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* The Fifth Circuit, in holding that the defendant had been erroneously denied a competency examination, also pointed to certain otherwise coherent trial testimony by the defendant that nonetheless warranted further inquiry: "While Lokos' demeanor and testimony . . . might not have prompted the trial judge to investigate further, Lokos also presented a history of mental illness, suffered learning disabilities as a child as well as an inability to adapt to his social environment, and experienced a series of commitments to a mental institution." 625 F.2d at 1262-63.

the proceedings and to consult meaningfully with his attorney.*

Accordingly, this case presents an opportunity for this Court to clarify the standards of Pate and Drope as applicable to criminal defendants whose overt behavior during trial appears unremarkable, but whose past histories are laden with evidence of serious mental disease.

IV.

THIS CASE PROVIDES THIS COURT WITH AN OPPORTUNITY TO CLARIFY THE CAPITAL-JUROR SELECTION DOCTRINES OF WITHERSPOON v. ILLINOIS AND ADAMS v. TEXAS AS APPLICABLE TO FEDERAL HABEAS CORPUS REVIEW OF EXCLUSION OF JURORS WHO INDICATED EQUIVOCAL OR VACILLATING VIEWS OF THEIR RESPONSIBILITIES IN SENTENCING

This case, like others now on appeal in the Fifth and Eleventh Circuits,** raises important, not yet decided

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* The Court of Appeals stated--without a shred of support in fact--that Porter's lawyers had an "apparent belief that their client, despite his psychopathic personality, was fully competent." 709 F.2d at 953. That Porter's lawyers moved for an examination clearly demonstrates their view that he was possibly incompetent. See Drope v. Missouri, supra, 420 U.S. at 177 n.13 (doubt by defense counsel is "a factor which should be considered"). Indeed, as the Court of Appeals noted (709 F.2d at 952 n.4), Porter's counsel in his first trial apparently focused on the self-incrimination issue linked to the competency examination and were then apparently unwilling to allow an examination. Since Porter's counsel evidently knew that the self-incrimination issue was likely to be decided against them (by the same judge), their failure to press more vigorously for a competency examination is more than understandable. The Court of Appeals also referred to Porter's behavior at his 1976 trial (709 F.2d at 952), but whatever degree of lucidity may have been apparent at that proceeding is hardly proof that given his diagnosis, he was necessarily lucid, rational, and capable of assisting in his defense at a subsequent trial approximately three years later, as Pate clearly establishes.

** See O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983), petition for certiorari pending; Darden v. Wainwright, 699 F.2d 1031 (11th Cir. 1983), vacated pending rehearing en banc, 699 F.2d 1043 (11th Cir. 1983), aff'd en banc by an equally divided court, 708 F.2d 646 (11th Cir. 1983), vacated, __F.2d__ (11th Cir.

(footnote continued on next page)

questions as to the proper function of the federal habeas corpus courts in reviewing claims that prospective capital jurors were wrongfully excluded under the doctrine of such cases as Witherspoon v. Illinois, 391 U.S. 510 (1968) and Adams v. Texas, 448 U.S. 38 (1980).

The courts below considered excluded jurors (unlike those at issue in Witherspoon and Adams) who, on the one hand, stated that they were strongly committed against the death penalty, but, on the other hand, as conceded by the Court of Appeals (709 F.2d at 949) gave "responses of varying ambiguity" indicating that they were not irrevocably committed to vote against the death penalty regardless of the facts and circumstances that might emerge at trial. Both the District Court and the Court of Appeals relied only on the cold trial transcript of the voir dires of the six jurors whose exclusion was challenged under the Witherspoon doctrine. Significantly, the voir dire at issue in this case was conducted through questioning by counsel, not the trial judge. Compare Darden v. Wainwright, supra, 699 F.2d at 1038-40. Moreover, the trial judge made no findings or comments on any of the contested jurors' demeanor or credibility; indeed, with respect to none of the six contested jurors considered by the federal courts below did he articulate his reasoning supporting exclusion under Witherspoon.

A. The Need for Clarification of Witherspoon Standards With Respect to Ambivalent, Ambiguous or Confused Prospective Jurors

The first Witherspoon-related issue raised by this case is whether this Court should clarify Witherspoon as it

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(footnote continued from previous page)

Sept. 1, 1983); McCorquodale v. Balkcom, 705 F.2d 1553 (11th Cir. 1983), vacated pending rehearing en banc, 705 F.2d 1565 (11th Cir. 1983).

applies to jurors whose voir dire responses, viewed in toto, appear ambiguous and unclear on the question of whether they are constitutionally qualified to sit on a capital jury. Unless Witherspoon is clarified, the juror exclusion issue will produce varying and confusing lower court results in capital cases that are virtually indistinguishable. Compare Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981), cert. denied, 455 U.S. 1003 (1982) (holding juror exclusion improper because of insufficient clarity of his responses) with O'Bryan v. Estelle, supra (sustaining exclusion of jurors whose responses were unclear and equivocal) and with this case, 709 F.2d at 949 (noting jurors' "responses of varying ambiguity").

Witherspoon holds that to warrant exclusion because of reluctance to impose the death penalty, a venireperson must state "unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial may reveal." 391 U.S. at 516 n.7. The core holding in Witherspoon (quoted with approval by the Court of Appeals, 709 F.2d at 947) is as follows:

> "The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings."
>
> * * *
>
> "[N]othing we say today bears upon the power of a State to [maintain] a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear ... that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them ..." 391 U.S. at 522 n.21 (emphasis added).

This aspect of Witherspoon was quoted with approval in Adams v. Texas, supra, 448 U.S. at 44.*

The jurors' voir dire responses in this case are full of inconsistencies and appear, on a cold record viewed as a whole (and without the benefit of the trial judge's comments on juror credibility or demeanor), sufficiently ambivalent, ambiguous--and in some cases, confused--to raise a serious question as to whether the lower courts are applying the Witherspoon standards correctly and consistently.

To be sure, there are instances in the jurors' responses where they appear committed to vote against the death penalty regardless of the facts to emerge at trial. On the other hand, after making such responses, juror Herndon, after being specifically informed by the prosecutor that her duty as a juror could include "inflicting the death penalty," (Tr. 273), proceeded to state the following (Tr. 275):

> "Q: ***Despite what your personal convictions may be, could you set these aside and serve, and do your duty as a juror in a Capital Murder case?
>
> "A: Yes, I could do my duty as a Juror."

Contrary to the suggestion in Witherspoon that the burden of justifying exclusion was on the State, the Court of

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* Subsequent to Adams, the Court of Appeals for the Fifth Circuit in Burns v. Estelle, 626 F.2d 396, 398 (5th Cir. 1980) (en banc) stated that state trial judges and prosecutors, given the language in Witherspoon regarding the need for unmistakable clarity of a juror's responses needed for exclusion, should take care to probe jurors' views with extreme care before excluding them where they indicated serious opposition to the death penalty. See also Granviel v. Estelle, supra, 655 F.2d at 677, 678 & n.7, (condemning juror exclusion under Witherspoon where juror indicated "I could not" vote for the death penalty and did "[not] believe [he] could" render a verdict for the death penalty under any "facts and circumstances whatever").

Appeals held the defense attorney should have asked Ms. Herndon a follow-up question, 709 F.2d at 948, and stated that it was "unable to say her limited reply" (quoted above) "indicated any vacillation or equivocation in her previous statement of unalterable opposition to ... the death penalty." Ibid. That Court did not indicate how it came to this subjective conclusion based on a cold transcript that included no findings or comments on Ms. Herndon's demeanor, tone of voice, etc. Likewise, juror Rice demonstrated considerable vacillation. She first said "I think I agree" with the death penalty (Tr. 1090), then said she was opposed to being personally involved in its infliction (Tr. 1104-05), then said "I really don't know" when asked whether she could make her decision based on the evidence and the law. Tr. 1107-08. At this point, the trial judge declared Ms. Rice "qualified" (Tr. 1109), whereupon the prosecutor, who was permitted to ask additional questions on redirect, elicited the response, "I'm probably getting all mixed up" (Tr. 1110), after which Ms. Rice indicated that she was committed against the death penalty. Tr. 1111. At this point, with the record in an apparent shambles, the trial judge refused defense counsel's request to re-cross the witness and, without explanation, excluded Ms. Rice. Tr. 1111-12. Without any analysis, the Court of Appeals held (709 F.2d at 949): "Her testimony as a whole indicates her irrevocable opposition to her imposition of a death penalty in this case." Other jurors whose exclusion was upheld included (a) Mr. Martinez, who said he "didn't understand" the prosecutor's question on a juror's role in a Texas capital case (Tr. 558) and also affirmatively stated that he could do his duty and follow the law as set forth by the judge (Tr. 561-62); and (b) Ms. Prue, who said that she was "nervous as a cat"

(Tr. 1163) and "all confused" by the prosecutor's question. Tr. 1168-69.*

As noted in the preceeding paragraph, the overall responses of the excluded jurors were neither clear nor unambiguous. Although it is theoretically possible that each juror was clear and unambiguous in his or her own mind about unalterably opposing the death penalty regardless of what facts would emerge at trial, many of their responses (which often came after their initial statements of opposition to the death penalty) were so confused, ambivalent, and unclear as to belie any such conclusion. Neither the District Court nor the Court of Appeals had anything but a cold record before it; that record included no findings as to the jurors' demeanor or credibility that might have focused on the "state of mind" issue.

In sum, to the extent it is proper for federal habeas courts to rely on a cold voir dire transcript in deciding Witherspoon claims, this case presents an opportunity for the Court to clarify: (A) whether the "unambiguous" and "unmistakably clear" standard permits exclusion based on isolated juror responses; and (B) whether, in the event of no careful follow-up questioning by the prosecutor or trial judge, the Witherspoon standards are satisfied when there are additional juror responses that reasonably indicate a degree of juror ambivalence or confusion.

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* A fifth prospective juror, Mr. Vaughn, after stating that in his present state of mind, he would vote against the death penalty (Tr. 611-13), stated: "I'm willing to listen to the evidence to see what--it could be different, I don't know." Tr. 615-16. Mr. Cantu, the sixth prospective juror in question, said "I will hear [the evidence] and everything, but I don't know," and that he would listen to the facts and make a decision about what the facts are, Tr. 825-26, after which he was disqualified on the basis of his earlier responses.

B. The Extent to Which Federal Courts Should Rely Simply on a State Court Transcript in Deciding Witherspoon Issues

Another Witherspoon-related issue raised in this case is whether, as a matter of habeas corpus procedure, it is proper--where there is a reasonable degree of juror confusion or ambiguity--for the federal habeas corpus courts to rely simply on the state court transcript to decide the mixed law-fact question of whether the Witherspoon standards are satisfied.

Where a state trial judge ordering exclusion makes findings as to a juror's demeanor and credibility in support of his decision to exclude (notwithstanding a degree of ambivalence in the cold record), those findings are arguably entitled to deference, see Sumner I, supra, and amplification of the record may be unnecessary. See O'Bryan v. Estelle, supra, 714 F.2d at 404-07 (Buchmeyer, J., dissenting). On the other hand, where (as here) the state trial judge makes no findings at all and simply issues an unexplained order of exclusion, it would appear appropriate to go beyond the cold record and hold an evidentiary hearing pursuant to Townsend v. Sain, supra, to determine whether, in fact, the trial judge did apply the proper legal standard and what the actual facts were regarding the contested jurors' state of mind. See O'Bryan v. Estelle, supra, 714 F.2d at 403, 408-10 (Buchmeyer, J., dissenting).

Ordering a federal habeas evidentiary hearing on the Witherspoon issue would not be a novel procedure. E.g., Boulden v. Holman, 394 U.S. 478, 484 (1969); Jackson v. Beto, 428 F.2d 1054 (5th Cir. 1970); Marion v. Beto, 434 F.2d 29 (5th Cir. 1970). It would have the benefit of enabling federal courts on habeas review to have an illuminated record on the overriding issue of whether a

juror seemingly opposed to the death penalty but apparently somewhat ambivalent or confused about his or her actual state of mind meets the "unmistakably clear" Witherspoon test. Endorsement of such a procedure in this case would encourage state trial judges to focus more carefully on the Witherspoon standards, would encourage voir dire questioning to be full and clear, and would be an incentive for state trial judges to articulate their actual reasons for excluding particular jurors.

Given the large number of capital cases raising Witherspoon issues, a ruling of this Court providing these benefits would have the important effect of reducing, and certainly clarifying, the Witherspoon claims that capital cases so often involve.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: November 29, 1983

Respectfully submitted,

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APPENDIX

[1] The alleged fraud upon the patent office (and thus the public) may indeed inject a value into the weighing of whether equitable relief is available by an independent action beyond that normally affordable by a Rule 60(b) motion. Nevertheless, a threshold issue is whether the aggrieved party shows a wrong or fraud that is sufficient "to render it manifestly unconscionable for his successful adversary to enforce the judgment." *Pickford v. Talbott*, 225 U.S. 651, 657–58, 32 S.Ct. 687, 689, 56 L.Ed. 1240 (1911).

[2] Simply stated, under the particular circumstances here presented (where the plaintiff by abandoning discovery and entering into the consent judgment, and where the alleged nondisclosure has been previously held by a definitive Rule 60(b) judgment not to be a "fraud on the court" as between the parties), the fraud alleged (the asserted failure to disclose prior use or prior publication to the patent office before the patent was issued, or to the plaintiff when enforcement of the patent was sought against it) is not of such weight as to outbalance under the circumstances before us "the general policy in favor of finality of litigation" concluded by a patent-validity consent judgment and in which the complaining party could reasonably have, but failed to, raise as a defense the matter now relied upon to prevent enforcement of the judgment. *USM Corporation v. SPS Technologies, Inc.*, 694 F.2d 505, 508–10 (7th Cir.1982). In short, under the circumstances here presented, accepting all the plaintiff's allegations as true, it is not "manifestly unconscionable" to enforce the consent judgment against this plaintiff, and it is therefore not entitled to the equitable relief brought by its action.

III.

If the plaintiff's attack upon the consent decree fails, it is res judicata as to the matters concluded and bars the other causes of action pleaded by Counts II (declaratory action seeking determination of invalidity of the patent), III (antitrust action founded on enforcement of a patent procured by fraud on the patent office), and IV (unfair competition through enforcement of a fraudulently procured patent). Nor does the plaintiff cite authority to the contrary.

Conclusion

Accordingly, we AFFIRM the judgment dismissing the plaintiff's suit.

AFFIRMED.

Henry Martinez PORTER, Petitioner-Appellant,

v.

W.J. ESTELLE, Jr., Director, Texas Department of Corrections, Respondent-Appellee.

No. 82-2499.

United States Court of Appeals, Fifth Circuit.

July 18, 1983.

Rehearing and Rehearing En Banc Denied Aug. 31, 1983.

Defendant appealed from judgment of the United States District Court for the Southern District of Texas, Hayden W. Head, Jr., J., denying, without evidentiary hearing, his petition for writ of habeas corpus with respect to his conviction for capital murder and imposition of death penalty. The Court of Appeals, Tate, Circuit Judge, held that: (1) based upon voir dire examination of each juror as a whole, state trial judge properly excused for cause each of six jurors because he or she was shown to have been irrevocably committed to vote against imposing death penalty; (2) trial judge's failure to conduct further inquiry into incompetency was not constitutionally deficient; (3) defendant failed to establish that evidence of another offense was inadmissible and that its unobjected-to prejudicial misuse was so fundamentally unfair as to constitute a denial of due process at state

trial; (4) admission of police officer's version of defendant's oral confession did not entitle him to habeas relief; and (5) prosecutor's statements in closing argument were not manifestly intended or not of such character that a jury would naturally and necessarily take them to be a comment on failure of defendant to testify.

Affirmed.

1. Jury ⇐33(2.1)

Improper exclusion of even one juror in capital cases on basis of juror's attitude toward death penalty removes from state power to impose death penalty.

2. Jury ⇐108

In determining not to exclude juror on basis of his opposition to capital punishment, trial court must ascertain that juror can put aside his personal convictions against the sanction and "do his duty" as a juror.

3. Jury ⇐108

Based upon voir dire examination of each juror as a whole in capital murder case, state trial judge properly excused for cause each of six jurors because he or she was shown to have been irrevocably committed to vote against imposing death penalty in the prosecution then under way.

4. Criminal Law ⇐625

As a corollary to principle that conviction of an accused person while he is legally incompetent offends due process, a trial judge must sua sponte conduct an inquiry into a defendant's mental capacity if evidence raises a bona fide doubt as to defendant's competency; and judge's failure to do so constitutes a denial of right to a fair trial that may invalidate the conviction.

5. Criminal Law ⇐393(1)

Statements of an accused ordinarily may not be used against him in either merit-trial or penalty hearing when obtained from him by an examining physician during court-ordered mental examination for purposes of determining his competency to stand trial or his insanity at time of the offense, in absence of waiver of his Fifth Amendment rights against self-incrimination under principles similarly applicable to other custodial interrogations. U.S.C.A. Const.Amend. 5.

6. Habeas Corpus ⇐45.2(4)

If there is no bona fide doubt as to accused's competency to stand trial, state trial court's refusal to limit use of psychiatric examination requested by defendant does not, even if this refusal is deemed to be erroneous, constitute prejudice to federal constitutional rights of the accused such as to warrant habeas corpus relief. U.S.C.A. Const.Amends. 5, 14.

7. Habeas Corpus ⇐45.2(4)

Trial judge did not receive information which, objectively considered, should reasonably have raised a doubt about defendant's competency and alerted him to possibility that defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense and, therefore, trial judge's failure to conduct further inquiry into incompetency was not constitutionally deficient such as would warrant habeas corpus relief. U.S.C.A. Const.Amends. 5, 14.

8. Habeas Corpus ⇐45.2(4)

Even admission of evidence that is erroneous under state law does not entitle a convicted person to federal habeas relief unless the evidentiary ruling has resulted in a denial of fundamental fairness under due process clause; even erroneous admission of prejudicial evidence can justify habeas relief only if it is material in the sense of a crucial, critical highly significant factor.

9. Habeas Corpus ⇐45.2(4)

Defendant failed to establish that evidence of another offense was inadmissible and its unobjected-to prejudicial misuse was so fundamentally unfair as to constitute a denial of due process at state trial such as to justify federal habeas relief. U.S.C.A. Const.Amends. 5, 14.

10. Habeas Corpus ⇐25.1(8), 45.2(4)

Admission of police officer's version of defendant's oral confession did not entitle

defendant to habeas relief because it did not constitute either a violation of an applicable state statute or a denial of a fundamentally fair trial as required by due process clause. U.S.C.A. Const.Amend. 14.

11. Criminal Law ⇐721(3)

Prosecutor's statements in closing argument that defendant's postarrest, signed exculpatory statement was "not sworn" and "not made under oath" were not manifestly intended or were not of such character that a jury would naturally and necessarily take them to be a comment on failure of defendant to testify. U.S.C.A. Const.Amend. 5.

Douglas Tinker, Corpus Christi, Tex., A. Deniz Tor, Gelberg & Abrams, John A. Herfort, Andrea G. Hirsch, Edward M. Chikofsky, New York City, for petitioner-appellant.

Mark White, Atty. Gen., Leslie A. Benitez, Asst. Atty. Gen., Austin, Tex., for respondent-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before RUBIN and TATE, Circuit Judges, and STAGG *, District Judge.

TATE, Circuit Judge:

This is an appeal from the district court's denial, without an evidentiary hearing, of the petition of Henry Porter, a Texas prisoner, for a writ of habeas corpus, 28 U.S.C. § 2254, with respect to his conviction for capital murder and the imposition of the death penalty. This federal habeas application asserts that certain errors of constitutional dimensions occurred during the 1979 state trial of Porter that resulted in his conviction and death penalty, which was affirmed at *Porter v. State*, 623 S.W.2d 374 (Tex.Cr.App.1981), *cert. denied*, 456 U.S. 965, 102 S.Ct. 2046, 72 L.Ed.2d 491 (1982).[1]

On the present appeal, Porter contends that the district court erred in failing to afford him habeas relief, or at least an evidentiary hearing, because under the showing made the conduct of the trial in the Texas state court had deprived him of various constitutional rights due to: (1) the exclusion of venirepersons who were only equivocally opposed to the death penalty; (2) the rejection of the defendant's request for a psychiatric examination to determine his competency to stand trial because the defendant had insisted that the results of the examination be barred from the penalty hearing; (3) the admission of extrinsic offense testimony by his victim in a prior crime; (4) the introduction of evidence of an alleged oral confession by the defendant; and (5) the prosecution's reference in closing argument to the fact that Porter's out-of-court exculpatory written statements were not made under oath, an alleged comment upon his failure to testify. Finding no reversible merit in these contentions, we affirm the dismissal of the petitioner Porter's habeas petition.

We shall first discuss *I.* the Juror-Exclusion and *II.* the Competency Psychiatric Examination issues, before setting forth the factual context in which the other three contentions of error in the guilt/innocence trial arises: *III.* Evidentiary Objections: *A.* Introduction of an Extrinsic Offense and *B.* Introduction of an Oral Confession; and *IV.* the Prosecutor's Alleged Comment upon the Accused's Failure to Testify.

I. *Juror Exclusion*

[1] Porter contends that six prospective jurors were disqualified from serving in his

* District Judge of the Western District of Louisiana, sitting by designation.

1. This was a second trial for the offense. An initial conviction and death sentence at a 1976 trial had been reversed on appeal. *Porter v. State*, 578 S.W.2d 742 (Tex.Cr.App.1979). The reversal was based upon the admission over objection at the penalty hearing (as denying confrontation rights) of letters, reports, and documents from a federal parole officer's file that reported a serious narcotic addiction and a number of serious mental and emotional handicaps that indicated poor possibilities of rehabilitation. 578 S.W.2d at 745. Among other things, these exhibits referred to Porter's "aggressive nature" and psychological reports that he had "a psychopathic personality" and "indications of paranoid schizophrenic behavior." 578 S.W.2d at 744.

trial, in violation of the principles enunciated in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The Supreme Court there held that the state may not exclude venirepersons from jury service in capital cases unless they make

> unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

391 U.S. at 522 n. 21, 88 S.Ct. at 1777 n. 2 (emphasis in original). Improper exclusion of even one juror on *Witherspoon* grounds removes from the state the power to impose the death penalty. As stated in *Davis v. Georgia*, 429 U.S. 122, 123, 97 S.Ct. 399, 400, 50 L.Ed.2d 339 (1976),

> Unless a venireman is "irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings," 391 U.S. at 522 n. 21, 88 S.Ct. at 1777 n. 2, [*Witherspoon*], he cannot be excluded; if a venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.

[2] In determining whether an unequivocal belief against the penalty has been expressed, we have held that "[o]nly the most extreme and compelling prejudice against the death penalty, perhaps only or very nearly a resolve to vote against it blindly and in all circumstances, is cause to exclude a juror on *Witherspoon* grounds." *Burns v. Estelle*, 592 F.2d 1297, 1300 (5th Cir.1979), *affirmed*, 626 F.2d 396, 398 (5th Cir.1980) (en banc). The trial court must ascertain that the venireperson who opposes capital punishment can put aside his personal convictions against the sanction and "do his duty" as a juror. *See Witherspoon*, *supra*, 391 U.S. at 515 n. 7, 88 S.Ct. at 1773 n. 7. Thus, in *Burns* we held that the trial court could not, without further questioning, exclude a juror merely because she admitted that the death penalty would "affect" her deliberations at the guilt/innocence phase of trial "on any issue of fact," 626 F.2d at 397–98 & n. 2, and we noted that even a "fixed opinion against" the death penalty was not per se disqualifying, 592 F.2d at 1299. Similarly, in *Granviel v. Estelle*, 655 F.2d 673 (5th Cir.1981), *cert. denied*, 455 U.S. 1003, 1007, 102 S.Ct. 1636, 1644, 71 L.Ed.2d 870, 875 (1982), a venireman's responses that he did not "think" he could vote for the death penalty, and did not "feel like he could take life in that manner" were insufficient to constitute a resolve to vote automatically against the imposition of capital punishment. 655 F.2d at 677. When there remains any ambiguity about the juror's unequivocal rejection of the penalty, further questioning is necessary to determine whether the juror could put aside his opposition. *Burns*, 626 F.2d at 398.

In *Williams v. Maggio*, 679 F.2d 381 (5th Cir.1982) (en banc), we noted that on federal habeas review "[c]lose scrutiny of the voir dire examination of each juror" whose exclusion is now challenged is warranted, 679 F.2d at 384, to determine whether "the stiff requirements of *Witherspoon* and its progeny", 679 F.2d at 386, are met.

In *Williams*, *supra*, an excused juror had initially indicated mere uncertainty as to whether she could return a verdict requiring the death penalty, and had equivocated in her response to a question as to whether she could *ever* return such a verdict. Nevertheless, on examining these responses in the context of the entire voir dire examination of the juror, the en banc majority concluded that "automatic opposition to the death penalty [was] established," despite these uncertain and equivocating responses, when they were "viewed in conjunction with [the juror's] previous statement of clear opposition to the death penalty." 679 F.2d at 385. In reviewing whether the juror could in the light of her entire voir dire examination be determined to be merely equivocal or vacillating with regard to the death penalty (rather than unalterably

opposed to it), the en banc majority rejected the contention that under *Witherspoon* "exclusion of a venireman is impermissible unless he states in response to *all* questions that he absolutely refused to consider the death penalty". 679 F.2d at 386 (emphasis added). In affirming the exclusion of the juror, the court concluded

> *Witherspoon* and its progeny do not mandate that a prospective juror aver that she would refuse to consider the death penalty in every case that could possibly arise. If she knows enough about the case to know that she could not consider imposition of the death penalty regardless of what evidence might be presented, she must be excused.

679 F.2d at 385–86. *See also Bell v. Watkins*, 692 F.2d 999, 1007–08 (5th Cir.1982).

We have closely scrutinized in the light of the above principles the voir dire examination of each of the six prospective jurors alleged to have been excluded in violation of *Witherspoon*. We will not reiterate the details of each juror's examination, since those are accurately summarized by the Texas Court of Criminal Appeals in its thorough analysis, *Porter v. State*, *supra*, 623 S.W.2d at 377–79, as well as by the district court in its memorandum opinion denying federal habeas relief. In each case, the prospective juror on direct examination had emphatically and unequivocally stated a refusal to vote for a verdict that would result in the death penalty. In his cross-examination of the juror, defense counsel properly sought to show that the juror could put aside his personal convictions and do his duty as a juror, and thus was qualified to serve in this capital case. On the basis of the respective jurors' responses to these (mostly) general questions as to a willingness to do his duty, Porter argues that these jurors were merely vacillating and equivocal and were not shown to be irrevocably opposed to voting for a verdict that would require the death penalty in this case.

[3] Despite Porter's not unforceful arguments, we find no error in the previous courts' determinations that, based upon the voir dire examination of each juror as a whole, the state trial judge properly excused for cause each of the six jurors because he or she was shown to be irrevocably committed to vote against imposing the death penalty in the prosecution against Porter then under way.

On the present appeal, Porter particularly emphasized the alleged *Witherspoon* violations in the excusing for cause the prospective jurors Herndon and Rice.

On prosecution direct examination, the juror Herndon repeatedly expressed long-standing convictions against the death penalty that would require her to vote automatically against the death penalty no matter what the trial revealed. On defense cross-examination, she replied to the first two questions by stating that there was no way for the defense counsel to have her agree that the death penalty was possible in any case. The third and final defense question was to ask her if she could put her convictions aside and do her duty "as a *Juror in a Capital Murder case.*" She replied, "Yes, I could do my duty as a *Juror.*" The defense counsel then rested. The trial court then sustained the challenge for cause. When defense counsel objected, the prosecutor pointed out that the general question asked of doing her duty as a juror had not included "the second predicate question in *Burns*.... [that] if it meant sentencing a man to death, could you follow that duty?" Defense counsel did not seek to ask this further question. In view of Herndon's repeated, firm, and unequivocal statements of irrevocable opposition of the death penalty under any circumstances, we are unable to say her limited reply that "she could do her duty as a *juror*" indicated any vacillation or equivocation in her previous statement of unalterable opposition to imposition of the death penalty.

Juror Rice, who had no theoretical objection to the death penalty, testified that she herself, however, could not vote for a death penalty, would exclude the death penalty regardless of what the facts might be, and would be compelled to vote against a verdict that required imposition of the death penalty, and firmly believed she could never

give a death penalty, regardless of the facts. On defense cross-examination, after being asked whether she could set aside her concern and reluctance and "do your duty as a citizen and make whatever decision, based upon the evidence before you that the law might require?", the prospective juror replied, "I really don't know." To a second question whether she knew "for sure one way or the other" whether she could, she replied, "No." The trial court then overruled the challenge. On the prosecutor's contention that the witness's responses to the general questions were insufficient to dilute her previously expressed unalterable opposition to herself voting for the death penalty, the district court permitted the prosecutor redirect examination. This redirect developed (as indicated on the previous direct examination) that Rice irrevocably could not under any circumstances vote for imposition of the death penalty, in her unequivocal replies to the six questions asked on redirect. Her testimony as a whole indicates her irrevocable opposition to her imposition of a death penalty in this case. We find no constitutional error in the trial judge's excusing her for cause and in refusing to permit further cross-examination by the defense of this emphatically and irrevocably convinced juror, as she repeatedly testified.

For similar reasons, we find no *Witherspoon* violation in the excusing for cause the other four jurors, Vaughn, Martinez, Cantu, and Prue. In each case, the prospective juror had reiterated irrevocable commitment against voting to impose a death penalty. In urging that nevertheless the juror vacillated on cross-examination, Porter relies on responses of varying ambiguity that indicated the juror would try to do his duty as a citizen. On redirect, Cantu and Vaughn repeated their irrevocable opposition earlier expressed. On his cross-examination itself as a whole, Martinez reiterated his irrevocable conviction against imposing the death penalty under any circumstances. Prue repeatedly testified on direct to her long-held conviction against capital punishment that would impel her automatically to vote against the assessment of the death penalty, regardless of the facts or evidence; on the defense cross-examination, four questions were asked (three of them eliciting replies of insignificant content), and when a prosecution objection to a fourth question was sustained,[2] defense counsel passed the juror.

II. *The Competency Psychiatric Examination*

The competency-examination issue in this case arises in the context of the following principles:

[4] As a corollary to the principle that the conviction of an accused person while he is legally incompetent offends due process, a trial judge must sua sponte conduct an inquiry into a defendant's mental capacity if the evidence raises a bona fide doubt as to the defendant's competency. The judge's failure to do so constitutes a denial of rights to a fair trial that may invalidate the conviction. *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); *Lokos v. Capps*, 625 F.2d 1258 (5th Cir.1980).[3]

2. The trial court sustained a prosecution objection to the question whether the juror could, despite her expressed conviction, set it aside "if chosen on this Jury, and do your duty as a citizen and decide the facts as they were presented to you?" The objection was that the question did not include a reference to the juror doing his duty "knowing the possible punishment is death." Whatever the procedural merits of the ruling, it does not implicate a *Witherspoon* issue in itself. Instead of reframing the question, defense counsel objected to the ruling and terminated his questioning of the proposed juror.

3. In *Lokos v. Capps*, 625 F.2d 1258, 1261–62 (5th Cir.1980), we fully summarized the applicable principles:

> II. CONSTITUTIONAL GUARANTEES
>
> A. The Substantive Right
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> Constitutional due process requires that trial of an accused may be conducted only when he is legally competent. *Bishop v. United States*, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956). In *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), the Supreme Court wrote that the test for determining defendant's mental competency depends upon:

[5] On the other hand, the statements of an accused ordinarily may not be used against him in either merit-trial or penalty hearing when obtained from him by an examining physician during a court-ordered mental examination for purposes of determining his competency to stand trial or his insanity at the time of the offense, in the absence of waiver of fifth amendment rights against self-incrimination under principles similarly applicable to other custodial interrogations. *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *Battie v. Estelle*, 655 F.2d 692 (5th Cir. 1981). Furthermore, an accused's sixth amendment right to the assistance of his appointed or retained counsel requires that the accused be afforded "the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what ends the psychiatrist's findings could be employed." *Estelle v. Smith, supra*, 451 U.S. at 471, 101 S.Ct. at 1877.

The competency issue in the present case arose as follows: As noted earlier (see note 1 *supra*), in 1976 the defendant had previously been tried for the same offense, but in 1979 his conviction had been reversed by the state appellate court because of the admission into evidence at the penalty hear-

> [W]hether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceeding against him. *Id.* at 402, 80 S.Ct. at 789.
>
> One who has been convicted may collaterally attack that conviction by proving his incompetency at the time of the trial by a preponderance of the evidence. He is entitled to an evidentiary hearing for that purpose when he makes a showing by clear and convincing evidence to raise threshold doubt about his competency. *Zapata v. Estelle*, 585 F.2d 750 (5th Cir.1978).
>
> B. The Procedural Guarantee
>
> State procedures must be adequate to insure the right to be tried while competent. *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). A court must *sua sponte* conduct an inquiry into a defendant's mental capacity if the evidence raises a bona fide doubt as to the defendant's competency at that time. *Id.*; *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975).
>
> A "*Pate* violation is a procedural error by the trial court and it may occur only in the time frame encompassed by the trial itself and immediately related proceedings . . . . It is always open for the defendant to later assert his actual incompetence at trial in a subsequent collateral proceeding, but the substantive claim should not be confused with a defendant's procedural rights under *Pate* to a hearing whenever a bona fide doubt as to competence surfaces at trial." *Reese v. Wainright* [*Wainwright*], 600 F.2d 1085, 1093 (5th Cir.1979); *Zapata v. Estelle*, 588 F.2d 1017 (5th Cir.1979).
>
> The habeas corpus petitioner's burden to prevail on a *Pate* violation is different from the one stated above for the substantive claim. The complaint that a *Pate* procedural guarantee was violated is that, in the light of what was then known to the trial court, the failure to make further inquiry into defendant's competence to stand trial denied him a fair trial. *Drope*, 420 U.S. at 174, 95 S.Ct. at 905. The test is an objective one. *Pedrero v. Wainright* [*Wainwright*], 590 F.2d 1383 (5th Cir.1979). The question is: Did the trial judge receive information which, objectively considered, should reasonably have raised a doubt about defendant's competency and alerted him to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense. "While the Supreme Court has not articulated a general standard for the nature or quantum of evidence necessary to trigger a competency procedure, it has focused on three factors that should be considered: the existence of a history of irrational behavior, defendant's demeanor at trial, and a prior medical opinion." *Chenault v. Stynchombe*, 546 F.2d 1191, 1192-93 (5th Cir.1977), *citing Drope*, 420 U.S. at 180, 95 S.Ct. at 908. Even one of these factors, standing alone, may, in appropriate circumstances, be sufficient—"the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Drope*, 420 U.S. at 180, 95 S.Ct. at 908.
>
> If it is decided in the collateral attack that the original trial court committed a *Pate* violation, the question then becomes whether a hearing can now be adequately held to determine retrospectively the petitioner's competency as of the time of his trial. If the state does not convince the court that the tools of rational decision are now available, the writ should be granted. If a meaningful hearing can be held nunc pro tunc, then it proceeds with petitioner bearing the burden of proving his incompetency by a preponderance of the evidence. *Martin v. Estelle*, 546 F.2d 177 (5th Cir.1977); *Lee v. Alabama*, 386 F.2d 97 (5th Cir.1967).

ing of unauthenticated hearsay statements in a 1973 probation report that, inter alia, referred to Porter's "psychopathic personality" and the "indications of paranoid schizophrenic behaviour" in his conduct. In the second (or present re-)trial, after the jury was selected and just before it was empanelled, the prosecutor discovered information as to a psychiatric episode in the accused's early life (to be quoted below) that he brought to the attention of defense counsel. Tr. 1633–36. There is little question, as the state courts found, but that this was the earliest knowledge the prosecutor had of the information, which he discovered in a search of miscellaneous records, at the request of the accused's defense counsel, for documents unrelated to the present issue.

The jury was then sworn and the first day of trial concluded with the testimony of six witnesses for the State. Before testimony commenced the next morning, out of the presence of the jury, the defendant's counsel stated to the court that he had become concerned about "the report that was brought to our attention" concerning the psychiatric problems of the accused and that he wanted a psychiatric examination, but "only if I can have a ruling from the Court that whatever the results of that examination, that it cannot be used in any hearing on punishment", because in a "Capital Murder" case "if a psychiatrist is called in for an examination, there is a possibility that ... you are developing evidence for the use of the prosecution in the hearing on punishment if the case gets that far." Tr. 1863.

The state objected to this limitation, although conceding that "the way the case law is that both Court and the defense counsel should have him examined." Tr. 1865. In response to the prosecutor's argument, the trial court ruled, "I don't follow what you are saying, but I will deny the request [for a limitation upon use of the examination]. If you [defense counsel] want to let it [the examination report] be the record of the Court and used by either side, I will let him be examined." Tr. 1866. Defense counsel refused the offer of the examination "if the Court is not going to limit the findings of the doctor to the issues as to his present competency to stand trial or his insanity at the time of the crime." *Id.*

Porter's counsel persuasively argues that under *Pate v. Robinson* and *Estelle v. Smith, supra*, the district court's ruling refusing to limit the use of the psychiatric examination was erroneous. Where there is a bona fide doubt as to the accused's competency to stand trial and the trial court is therefore under a duty to order a mental examination, *Pate v. Robinson, supra*, the trial court cannot compel him (it is argued) to choose between his constitutional right in that regard and his constitutional right to the assistance of counsel "in making the significant decision of whether to submit to the examination and to what ends the psychiatrist's findings [may] be employed." *Estelle v. Smith, supra*, 451 U.S. at 471, 101 S.Ct. at 1877. As with the fifth-amendment-based prohibition against use against an accused in a merit trial of his testimony in a suppression hearing in support of his fourth amendment right against unlawful seizures, it is "intolerable that one constitutional right should have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394, 88 S.Ct. 967, 976, 19 L.Ed.2d 1247 (1968).

[6] The flaw in Porter's argument, as we see it, is that, under the present facts, the showing before the trial judge did not trigger any constitutional duty upon him to order a psychiatric examination, because the showing did not raise a bona fide doubt under the circumstances as to the defendant's competency to stand trial. The mere circumstance that an accused is afflicted with some mental deficiency or that he has in his past been afflicted with psychoses does not necessarily implicate incompetency for trial purposes. The test of competency to stand trial "'must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'" *Dusky v.*

United States, 362 U.S. 402, 80 S.Ct. 788, 789, 4 L.Ed.2d 824 (1960). Thus, if there is no bona fide doubt as to the accused's competency in that respect, the state trial court's refusal to limit use of the psychiatric examination requested by the defendant does not—even if this refusal is deemed to be erroneous—constitute prejudice to the federal constitutional rights of the accused. Only a bona fide doubt as to competency triggers the due process right to further inquiry that might justify federal habeas relief.

Before discussing the context in which the defendant's request for a psychiatric examination on grounds of competency was made, we note preliminarily that Porter does not assert any actual incompetency during trial. Here, he asserts only a violation of the *Pate-Drope* "procedural rules designed to detect incompetence and insure a fair trial", *Reese v. Wainwright*, 600 F.2d 1085, 1093 (5th Cir.1979). As to that issue, the test is whether, "in the light of what was then known, the failure to make further inquiry into petitioner's competency to stand trial, denied him a fair trial." *Drope v. Missouri*, 420 U.S. at 174, 95 S.Ct. at 896.

The defense counsel's concern about the possible need for a competency examination was expressed as being based upon an earlier psychiatric problem of the defendant as revealed by the 1959 probation report that the prosecutor had furnished him the previous day during this 1979 trial. Before noting the contents of that report, it may be well to summarize the context in which it came to light.

Porter has been first tried in 1976 before the same state trial judge, and he had testified before him on a pretrial hearing and at the trial on the merits, during which the judge had the opportunity to observe him and evaluate his competency and his conduct during the entire trial in connection with his lawyer's representation of him. The present appellate record was supplemented with Porter's testimony in his appearances as a witness in the earlier trial, and his testimony appears coherent, articulate, and a straightforward presentation of his defense (an accident rather than an intentional shooting), with capable responses on cross-examination. No claim is made that he acted irrationally either at the first trial or the second. If the question of his incompetency was raised at the first trial,[4] it was resolved against him. Despite the circumstance that the appellate opinion reversing the conviction at the first trial expressly referred to the report of "unnamed psychologists" that Porter had a " 'psychopathic personality' and 'indications of paranoid schizophrenic behavior' ", *Porter v. State*, 578 S.W.2d 742, 744 (Tex.Cr.App. 1979), his attorneys representing him on the remand (one of whom, Anderson, had also represented him on the first trial) did not request any psychiatric examination in the months before the second trial commenced. They did so, on the second day of the trial (after sitting with him for at least seven days of voir dire examination), only on the basis of concerns allegedly arising from a statement contained in a probation officer's pre-sentence report of August 13, 1959.[5]

This 1959 pre-sentence report was in connection with the defendant's conviction on a burglary charge at the age of 17. (Porter was born December 12, 1941.) Its six pages rather fully describe the young offender's social history and past brushes with the law. In the seven lines of "medical history", the report contains the statement relied upon at the trial as triggering a need for further psychiatric examination: "The defendant was sent to the State Hospital at Austin, Texas from Gainesville State School for boys, because he had hallucinations of seeing his father and speaking to him." Exhibit 35–A, p. 5. The report had earlier stated that, for robbery and burglary offenses when about 15 years old, the defendant had been sent to Gainesville School for boys in 1957 and "later sent for one month

4. In the present trial, the judge referred to the earlier trial at Fort Worth and that the attorneys had instructed Porter not to talk to the psychiatrist. Tr. 1864.

5. This was introduced in evidence at the penalty hearing. See State Exhibit 35–A, Tr. 2424.

at the State Hospital at Austin, Texas, from where the defendant escaped." *Id.*

The defendant was 37 years old at the time of the (second) trial. The mental disturbance noted had thus occurred some 22 years earlier. Despite the more recent (1973) psychologists' references to Porter's "psychopathic personality" and "paranoid schizophrenic behaviour", previous to receipt of the report of this 1957 incident, neither his own counsel—with the opportunity to work with him and to observe his demeanor and cooperation with them—had seen fit to raise any question as to Porter's rational and factual understanding of the proceeding against him nor as to his ability to consult with rational understanding with them in the preparation of his defense (the test of competency).

Likewise, and perhaps more pertinently, the trial judge extensively observed Porter and his ability to testify and to cooperate with his counsel during the first 1976 trial, and had observed Porter during the days of voir dire at the second trial. The trial court was thereby shown no reason to doubt Porter's competency, sharing Porter's lawyers' apparent belief that their client, despite his psychopathic personality, was fully competent to understand the proceedings against him and to consult with counsel in the preparation of his defense. In the context of this background, no bona fide doubt as to Porter's competency could reasonably be raised merely because of the recently-learned information that Porter, now 37, had been hospitalized in a mental hospital at the age of 15 for a month because he had hallucinations of seeing and talking to his dead father.

"[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion *on competence to stand trial* are all relevant in determining whether further inquiry [as to competency] is required." *Drope v. Missouri, supra*, 420 U.S. at 180, 95 S.Ct. at 908 (emphasis added). It is true that "even one of these factors standing alone may, in some circumstances, be sufficient." *Id.* Here, however, the 1957 episode does not in our opinion, either by itself or in combination with the later diagnoses of Porter's psychological problems, raise any bona fide doubt that he was incompetent when viewed, as would the trial judge, in the context of an extended period of observation during which Porter had shown himself to be fully competent and fully able to assist his counsel in his defense.

[7] This court has stated that the test as to whether a *Pate-Drope* duty of further inquiry arises is: "Did the trial judge receive information which, objectively considered, should reasonably have raised a doubt about defendant's competency and alerted him to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense?" *Lokos v. Capps, supra*, 625 F.2d at 1261. For the reasons above-stated, our review of the record requires us to agree with the federal district court and the Texas courts' *Porter v. State, supra*, 623 S.W.2d at 380–81, that this determinative question must be answered in the negative, and that the trial judge's failure to conduct further inquiry into incompetency was not constitutionally deficient under *Pate* or *Drope*.

The petitioner Porter nevertheless argues that the rejection of his constitutional claim on this basis is improper, because the state trial judge did not deny Porter a competency examination on such basis but, rather, because Porter's counsel refused to consent to its (possible) misuse against him in the penalty hearing. Porter also points out that the state conceded the need for a competency examination under existing law, so that *if* Porter had other showing to make (none has been suggested, however), the state's concession deprived him of that opportunity.

Examination of the state trial judge's ruling and the colloquy preceding it does not indicate any agreement on his part that further psychiatric examination was indicated, merely a willingness to order one if the defendant requested one and an unwillingness to issue an order at that time as to its hypothetical future use in the penalty

proceeding. Neither in the original federal habeas petition, see R.I, p. 54 at 61–62, nor at any other stage in the present state prosecution, post-conviction review, or federal habeas proceedings, has the contention been made that Porter was in fact incompetent to stand trial—the complaint made is limited to whether the trial judge improperly inhibited Porter's *Pate-Drope* right to further inquiry as to his competency by refusing to order a competency examination subject to its non-use in the penalty proceedings. For purposes of federal habeas review, however, the predicate issue for affording Porter habeas relief depends upon whether the record as known to the trial judge raised a bona fide doubt as to Porter's competency so as to implicate constitutional rights to a fair trial under *Pate-Drope* principles. For the reasons stated, no such predicate constitutional deficiency is shown in Porter's state trial, and we are unwilling to agree that the state's mistaken concession as to the need for a competency examination somehow created constitutional error where none is shown.

III. *Evidentiary Objections*

Porter seeks federal habeas relief on the basis of the introduction, over his objection, of the following evidence at the guilt-innocence phase of the trial: *A.* the eyewitness testimony of a victim of an armed robbery, and *B.* his oral confession of "the murder" of the police officer. He asserts that both instances of testimony were so prejudicial and inflammatory that he was denied the "fundamentally fair trial" guaranteed by the due process clause of the fourteenth amendment.

To help understand Porter's contentions of gross prejudice, we briefly recapitulate the factual basis and the central issue of the prosecution and defense:

Porter was indicted and on trial for capital murder. The death of the victim, a Fort Worth police officer, resulted from the officer's stop of a vehicle driven by Porter in connection with his reported involvement in recent robberies. The charge of capital murder against Porter required proof that he had knowingly and intentionally killed a peace officer who was acting in the lawful discharge of an official duty. Tex.Penal Code Ann. § 19.03(a)(1) (Vern.1974). Porter's defense was that his shooting of the officer was unintentional and had occurred in a struggle as he was attempting to escape, after first being shot by the officer without provocation, when Porter's own weapon accidentally discharged.[6] The main thrust of this defense was to escape the capital-penalty consequences of an *intentional* shooting of a police officer acting lawfully—so as to be subject instead, at most, to conviction of the *non*-capital homicide and assault offenses permitted as responsive verdicts to the indictment for capital murder.

A. *Introduction of an Extrinsic Offense*

Porter claims that he was denied due process in the conduct of the guilt-innocence phase of the trial for the shooting of the police officer because the trial court permitted the State to introduce eyewitness testimony of a victim of an aggravated robbery committed by Porter eleven days before the shooting. The prosecution sought to prove the defendant's motive for killing the policeman: Porter's escape from apprehension that would lead to arrest for the robbery. The defense offered to stipulate as to the fact of the robbery to establish Porter's flight motive; the defense objected to the eyewitness details of the robbery being presented to the jury. The court limited the State to presenting evidence of only one of the several robberies Porter had allegedly committed before the shooting, and provided a limiting instruction with respect to the testimony. In admitting the evidence, however, the district

6. This defense was presented by Porter's own testimony at the first trial, the conviction that was reversed. *See* note 1 *supra*. Porter did not testify at the present retrial, but this defense was advanced based upon a written statement he had given the police shortly after his arrest and upon deductions attempted to be drawn from circumstantial evidence and the testimony of a bystander.

court outside the presence of the jury admitted it to prove "motive, malice, and intent." See prosecution trial brief, Tr. 56–61. The prosecutor referred to the victim's testimony several times during closing arguments.

The effect of the admission of this extraneous defense and its details, Porter argues, was not only to permit proof of motive, proper under state law, but also to permit the jury from this testimony to infer that Porter intended to kill the policeman, as argued by the prosecutor.

Susan Chandler, the robbery victim, testified before the jury (again, over defense objection, Tr. 2317) that the defendant had robbed at gunpoint the cash register of the store where she worked, then led her to the store room, where she was "struck from behind. At some point thereafter, two to five minutes, I regained consciousness. I was lying in quite a bit of my own blood." (Tr. 2320). There were "two lacerations" on the back of her head that were "fairly deep." (Tr. 2322). The defense had no questions on cross; it renewed the objection to the entire testimony, asked for a mistrial, and then a limiting instruction (Tr. 2324–25). Chandler was the State's last witness, and the defense did not put on any witnesses.

The limiting instruction subsequently given to the jury was:

> You are further instructed that if there is any testimony before you in this case regarding the defendant's having committed offenses other than the offense alleged against him in the indictment, you cannot consider said testimony for any purpose unless you find beyond a reasonable doubt that the defendant committed such other offenses, if any were committed, and even then you may only consider the same in determining the intent and motive of the defendant, if any, in connection with the offense, if any, alleged against him in the indictment, and for no other purpose.

No objection was made to this instruction as given.

The prosecutor referred repeatedly to the Chandler beating in his closing argument, Tr. 2334, 2337–38, 2352, 2402, 2404, 2413–14, again without objection (except once that his argument that "what if Chandler had been shot" was "outside the record", Tr. 2402).

In its brief to the Texas Court of Criminal Appeals, the defense objected to the admission of Chandler's testimony on the grounds that (1) a showing of motive—in this case Porter's desire to flee apprehension for the prior robberies—is not a *necessary* element of the crimes for which he was charged (supposedly, a requirement before admission), so that extraneous offense evidence should not have been permitted; (2) intent could be inferred from the shooting itself, and the robbery could not show Porter's intent to *kill* the policeman; and (3) the prejudicial value of the evidence far outweighed its probative value, if any. The defense did not mention its attempt to stipulate as to Porter's involvement in the robbery, or the inflammatory nature of the prosecution's closing arguments. The Court of Criminal Appeals ruled that the evidence of an extraneous offense was permissible to show motive because motive is relevant as a circumstance in determining the commission of an offense, *Porter v. State*, *supra*, 623 S.W.2d at 385–86; here, Porter's motive to avoid apprehension.

On this habeas appeal, Porter asks us to consider that the evidence, not necessary to the State's case, was inflammatory and highly prejudicial to Porter's guilt and innocence trial. Porter characterizes the admission of this evidence for purposes of proving intent as a violation of Texas law and a federal due process violation due to its significance to the conduct of a fundamentally fair trial. He argues that the trial court did not weigh the prejudicial and probative value of the live-witness testimony and had no reason to reject the proffered stipulation for the purpose of proving Porter's motive for the shooting without the prejudicial details of the incident to which the witness testified. On his present habeas appeal, Porter refers to, but does not expressly

attack, the prosecution's use of the testimony.

At this point, we summarize: The admission of the extrinsic offense was clearly proper under state law to prove motive. While it might be preferable if state law permitted a stipulation of the limited fact (the prior robbery) for which the proof was relevant instead of the full details, *cf. United States v. Webb*, 625 F.2d 709, 710 (5th Cir.1980), we are aware of no federal constitutional requirement that the prejudicial effect of admissible relevant testimony be so minimized. However, the extrinsic offense was arguably inadmissible under state law to prove the accused's *intent*,[7] and Porter raised this point as part of his assignment of error that the extrinsic offense was improperly admitted—a contention as to which the Texas appellate court made no comment, finding that the offense was admissible to prove motive. *Texas v. Porter, supra*, 623 S.W.2d at 385–86. The prejudicial use of this extrinsic offense with regard to intent was the trial court's instruction to the jury that it could consider it for that purpose and was the prosecutor's repeated reliance upon it for that purpose—as to which no objection was made at trial or on state appellate review on direct appeal.[8]

7. Under Texas state law in effect prior to Texas's adoption of the federal rules of evidence in 1983, evidence of extraneous offenses is permitted under only limited circumstances, to show, *e.g.*, identity, modus operandi, specific intent or lack of a defense, or motive, when these issues are in dispute. *See generally Albrecht v. State*, 486 S.W.2d 97, 99–101 (Tex.Cr.App.1972). The Texas state court is required to compare the probative value of the prior offense with its prejudicial or inflammatory aspects in an ad hoc determination based on the facts of the case. *Ruiz v. State*, 579 S.W.2d 206, 209 (Tex.Cr.App.1979). If "the evidence is offered only to show that the accused has once committed a crime, and [that the defendant] is therefore likely to have committed the principal offense," it is not admissible. *Ford v. State*, 484 S.W.2d 727, 729 (Tex.Cr.App.1972). Erroneous admission of such evidence is rarely considered harmless, unless there exists overwhelmingly certain evidence as to all of the elements of the charged crime independent of the extrinsic offense. *See, e.g., Ruiz v. State*, 579 S.W.2d 206 (Tex.Cr.App.1979); *Powell v. State*, 478 S.W.2d 95, 98 (Tex.Cr.App.1972); *Ford v. State*, 484 S.W.2d 727 (Tex.Cr.App.1972).

8. In effect, Porter now asks us to consider—as federal constitutional impediments to his right to a fair trial—state trial court errors that he did not raise in state court at either the trial or appellate level. Under Texas procedure, a party's failure to object to the prosecution's statements in closing argument operates to waive his right to complain on appeal. *Sanchez v. State*, 589 S.W.2d 422, 424 (Tex.Cr.App.1979). *See also Bell v. State*, 620 S.W.2d 116, 126 (Tex.Cr.App.1981); *Brock v. State*, 556 S.W.2d 309, 314 (Tex.Cr.App.1977). The grounds of error in the appeal must be similar to the basis of the objection made at trial. *See Smith v. State*, 513 S.W.2d 823, 830 (Tex.Cr.App.1974). Moreover, the defendant waives any possible grounds of error that he does not specify on appeal in a timely fashion. *See, e.g., Bell, supra*, 620 S.W.2d at 126; *Hawkins v. State*, 613 S.W.2d 720, 723 (Tex.Cr.App.1981).

The state appeals court may, however, examine an unassigned error or one made in an untimely or improper fashion if it should be reviewed "in the interest of justice." Tex.Code Ann.Crim.Pro. art. 40.09(9), (13) (Vern.1979). The Texas courts have exercised its discretionary review under this provision for errors of state and statutory federal constitutional magnitude such as double jeopardy, *see Tatum v. State*, 534 S.W.2d 678, 680 (Tex.Cr.App.1976), a fundamentally defective indictment, *see Zachery v. State*, 552 S.W.2d 136 (Tex.Cr.App.1977), the trial court's assessment of a greater punishment after conviction on retrial, *see Lechuga v. State*, 532 S.W.2d 581, 582 (Tex.Cr.App.1975). The courts have expressly denied discretionary review of an unassigned error regarding admission of extrinsic offense evidence that was objected to at trial on grounds different from those specified at trial. *See Bell, supra. Cf. Felder v. State*, 564 S.W.2d 776, 778 (Tex.Cr.App.1978) (en banc) (properly preserved objection to act of alleged prosecutorial misconduct not correctly presented on appeal nonetheless considered by the court in the interest of justice).

In this case, Porter did not object to the prosecutor's closing argument, nor to the instruction to the jury that it could consider the eyewitness extrinsic offense testimony as evidence of *intent* as well as motive. The defendant did not raise these points on state direct appeal in his original brief, so that they, and the argument that the trial court should have permitted a stipulation as to the extrinsic offense constituting motive rather than admitting potentially prejudicial testimony from the victim, would under state law be waived as new grounds of error not raised in the original brief. These objections, raised for the first time before *this* court on federal habeas review, could not properly be presented to the state court for appellate review. *See Coleman v. Texas*, 632

[8] Although we as a state appellate court might on review have found the use of the extrinsic-offense evidence to constitute error under state law (see notes 7 and 8 *supra*), our function as a federal habeas court is limited. "We have repeatedly admonished that we do not sit as a super state supreme court on a habeas corpus proceeding to review error under state law." *Mendiola v. Estelle*, 635 F.2d 487, 491 (5th Cir. 1981), quoting *Cronnon v. Alabama*, 587 F.2d 246, 251 (5th Cir.), *cert. denied*, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 792 (1979). Even the admission of evidence that is erroneous under state law does not entitle a convicted person federal habeas relief unless the evidentiary ruling has resulted in "a denial of fundamental fairness" under the due process clause. *Id.* Even the erroneous admission of prejudicial evidence can justify habeas relief only if it is "material in the sense of a crucial, critical highly significant factor." *Anderson v. Maggio*, 555 F.2d 447, 451 (5th Cir.1977) (quoting *Hills v. Henderson*, 529 F.2d 397) (5th Cir. 1976), *cert. denied sub. nom Hills v. Maggio*, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976)).

In the present instance, the extrinsic offense was properly admitted as relevant to motive, although (only) arguably the trial jury was improperly instructed and the prosecutor improperly argued (both without objection by counsel shown by the record to be diligent and able) that the jury could likewise consider this evidence on the question of intent. The present contention is thus distinguishable from that in *Bryson v. State of Alabama*, 634 F.2d 862 (5th Cir. 1981), where federal habeas relief was afforded, and where the admission of the extrinsic offense was concededly erroneous under state law, and the error for which federal habeas relief was sought had been timely asserted in the state proceedings.

[9] Under the circumstances here presented, we are unable to say that the extrinsic-offense error complained of, if error it was, was of "constitutional proportion" so as to violate due process and to justify federal habeas relief. *Reese v. Wainwright*, 600 F.2d 1085, 1090 (5th Cir. 1979). *See also Woods v. Estelle*, 547 F.2d 269 (5th Cir.1977); *Anderson v. Maggio*, *supra*, 555 F.2d at 451; *Hills v. Henderson*, *supra*, 529 F.2d at 401. Porter has failed to establish that the evidence in question was inadmissible and that its unobjected-to prejudicial misuse was so fundamentally unfair as to constitute a denial of due process at the state trial. Accordingly, his extrinsic-offense claim does not entitle him to federal habeas relief.

B. *Introduction of an Oral Confession*

Porter had been arrested two days after the shooting of the victim. During the arrest, Police Officer Hathorne discovered three letters addressed to two newspaper editors and an attorney, that Porter identified as his writing and gave the officer permission to read. No issue is now raised as to the admissibility of the letters themselves. The evidentiary objection now relied upon arose in connection with the admission of Officer Hathorne's testimony as to his contemporaneous notes of his conversation with Porter shortly after Porter's arrest.[9]

S.W.2d 616, 618 (Tex.Cr.App.1982). By these procedural defaults under state law, and in the absence of allegation as to justifying cause therefor, federal habeas review of the prejudicial use of the admissible extrinsic-offense evidence may be barred. *Mendiola v. Estelle*, 635 F.2d 487, 490 (5th Cir.1981).

The issue Porter actually preserved and presented to the state court—that extrinsic offense evidence may not be presented to show motive, because motive is not a necessary element of capital murder—was properly rejected on state appeal, *see Porter*, 623 S.W.2d at 385–86, under appropriate Texas jurisprudence.

9. The district court found that Porter did not allege that the statement was used in violation of any federal right, and thus found there was no issue for federal habeas review. Porter contends, however, that the violation of the state evidentiary rule resulted in introduction of prejudicial evidence and deprivation of his federal due process right to a fundamentally fair trial.

Porter's letters were identical and contained the statement: "This is my confession in the death of the Fort Worth Police Officer which no one was involved in but myself . . . my brother-in-law had nothing to do with the death or anything else that I have done. . . ." (In a

Officer Hathorne's notes as to his conversation with Porter concerning these letters, which over the defendant's objection he was permitted to read to the jury, stated as follows: "This officer asked Henry Porter, Jr. if these were his letters and he stated that they were and that they would clear his brother-in-law of any involvement on the murder in Fort Worth. He also stated that they contained his confession in the murder of the police officer." Porter contends that these statements were introduced in violation of the Texas evidentiary rule which bars admission of evidence of an oral confession unless the statement leads to the discovery of evidence tending to establish the defendant's guilt.[10]

The Texas criminal appeals court found that Hathorne's account of Porter's oral confession was admissible because it contained the same information that appeared in the inculpatory letters. 623 S.W.2d at 382. *See Brantley v. State*, 522 S.W.2d 519, 524 (Tex.Cr.App.1975); *Gutierrez v. State*, 502 S.W.2d 746, 749 (Tex.Cr.App.1975) (oral confessions admissible if they "contained in detail the same information" as a written statement). Porter argues before us that Hathorne's statement that he confessed to the "murder" of the deceased is not identical to the written confession that referred to the "death" or "shooting" of the police officer. A confession of "murder", Porter urges, is directly contradictory to his post-arrest written confession in which he admitted to shooting the police officer, but by accident or in self-defense, and was grossly prejudicial to his defense of accidental rather than intentional shooting.

[10] In finding no error, the Texas court apparently rejected the distinction Porter makes between the characterizations of "causing death" and "murder". We find that the admission of Hathorne's version of the oral confession does not entitle Porter to habeas relief, because it did not constitute either a violation of an applicable state statute or a denial of a fundamentally fair trial as required by the due process clause of the fourteenth amendment.[11] When there was no question as to whether Porter was responsible for the shooting and death of the police officer, the difference in terminology between the oral and written confessions that may have been of no consequence to a layman untrained in the law, is not "material in the sense of a crucial, critical highly significant factor," so as to implicate a denial of due process fair-trial rights. *Anderson v. Maggio*, 555 F.2d 447, 451 (5th Cir.1977).

IV. *The Prosecutor's Alleged Comment Upon the Accused's Failure to Testify*

Porter finally argues that the prosecutor violated his fifth amendment rights against self-incrimination by stating in closing argument that Porter's post-arrest, signed exculpatory statement was "not sworn" and "not made under oath." Porter contends that these references impermissibly commented on his failure to testify on his own behalf, and thus constituted constitutionally prejudicial error under *Griffin v. California*, 380 U.S. 609, 613, 85 S.Ct. 1229, 1232, 14 L.Ed.2d 106 (1965).

written statement, dated the day after his arrest, Porter again admitted shooting the police officer, but in a struggle over his gun after Porter himself was shot in the side.)

10. This rule, Tex.Code Crim.Proc. art. 38.22 (1967), provides:

> 1. The oral or written confession of a defendant made while the defendant was in jail or other place of confinement or in the custody of an officer shall be admissible if:
>
> (e) It be made orally and the defendant makes a statement of facts or circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed.

11. Nor was Texas courts' treatment of the oral confession so irrational and discriminatory that it violated the fourteenth amendment's equal protection clause. The evidence was relevant in establishing Porter's involvement in the killing, as were the written confessions, and as we discuss above, Hathorne's statement that Porter confessed to "murder" did not unduly prejudice the defendant before a lay jury so as to constitute "discrimination."

[11] We find, as did the federal district court in denying habeas relief, that these statements were not "manifestly intended or [were] not of such character that a jury would naturally and necessarily take them to be a comment on the failure of the accused to testify." *United States v. Wilson*, 500 F.2d 715, 721 (5th Cir.1974), *cert. denied*, 420 U.S. 977, 95 S.Ct. 1403, 43 L.Ed.2d 658 (1975). *See also United States v. Sorzano*, 602 F.2d 1201, 1202 (5th Cir. 1979) *cert. denied*, 444 U.S. 1018, 100 S.Ct. 672, 62 L.Ed.2d 648 (1982). We reject Porter's contention that the prosecution's statements—indicating the weight to be accorded out-of-court, unsworn statements—challenged the defendant's refusal to take the oath and "testify," and thereby called attention to his silence. *Cf. Davis v. United States*, 357 F.2d 438, 440–41 (5th Cir.), *cert. denied*, 385 U.S. 927, 87 S.Ct. 284, 17 L.Ed.2d 210 (1966) (infringement of right to remain silent where trial court ruled that the defense counsel could not impeach the prosecution's witness directly, but instead urged the defense to "put your people" on the stand to challenge that testimony).

Porter also characterizes this situation as one similar to that in which the prosecution impermissibly refers to the evidence as "uncontradicted" when only the non-testifying defendant is in a position to dispute the unchallenged evidence. *See, e.g., Davis, supra*, 357 F.2d at 440–41; *see also United States v. Jennings*, 527 F.2d 862, 871 (5th Cir.1976). Porter's somewhat attenuated argument is that, since no one but Porter could affirm or contradict the events set forth in the written exculpatory statement, the prosecution improperly emphasized Porter's failure to testify facts about which only he was directly knowledgeable. We reject this contention. By the remarks, the prosecutor did not directly assert or imply that proof of guilt was uncontradicted due to Porter's failure to produce sworn testimony. Rather, the focus of the prosecutor's remarks concerning the "unsworn" nature of the statement was to question its reliability at the time of its confection, where Porter relied upon the exculpatory statements therein made by himself after his arrest to establish his claim of self-defense or accident.

Because the prosecution's statements did not reflect directly or indirectly on the defendant's decision not to testify, we conclude that these statements did not result in violation of Porter's fifth amendment rights not to take the stand.

Conclusion

On the basis of the contentions made, we are unable to find that the state criminal proceedings leading to the petitioner Porter's conviction and sentence to death were infected with errors of constitutional dimension that entitle him to an evidentiary hearing or to general habeas relief. Accordingly, we AFFIRM the judgment of the district court that dismissed his petition for federal habeas review.

AFFIRMED.

CNG PRODUCING CO. and Forest Oil Corp., Individually and on Behalf of Columbia Gas Development Corp. and Texas Gas Exploration Corp., Plaintiffs-Appellants,

v.

COLUMBIA GULF TRANSMISSION CORP. and Texas Gas Transmission Corp., Defendants-Appellees.

No. 82-3274.

United States Court of Appeals, Fifth Circuit.

July 18, 1983.

Opinion on Denial of Rehearing Nov. 3, 1983.

Plaintiffs sued for damages to their oil platform occasioned by explosion occurring while defendants were venting natural gas. Judgment in the United States District Court for the Eastern District of Louisiana

Fifth Circuit Order
Denying Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
AUG 31 1983
GILBERT E. GANUCHEAU
CLERK

No. 82-2499

HENRY MARTINEZ PORTER,

Petitioner-Appellant,

versus

W.J. ESTELLE, JR., Director,
Texas Department of Corrections,

Respondent-Appellee.

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE

Appeal from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 7/28/83, 5 Cir., 198_, _____ F.2d____)

(August 31, 1983)

Before RUBIN and TATE, Circuit Judges, and STAGG*, District Judge.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this Panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

*District Judge of the Western district of Louisiana, sitting by designation.

RENO-6

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District Court Opinion

FILED
OCT 26 1982
JESSE E. CLARK, CLERK
BY DEPUTY:

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

HENRY MARTINEZ PORTER I

V. I C.A. NO. C-82-159

W. J. ESTELLE, JR., DIRECTOR, I
TEXAS DEPARTMENT OF CORRECTIONS I

MEMORANDUM AND ORDER
DENYING APPLICATION FOR WRIT OF HABEAS CORPUS

On May 29, 1979, Petitioner, Henry Martinez Porter, was found guilty of the capital offense of murdering a police officer in the course of performing his duty. Punishment was assessed at death by intravenous injection. This conviction was affirmed by the Court of Criminal Appeals and the United States Supreme Court subsequently denied certiorari. See Porter v. State, 613 S.W.2d 374 (Tex. Crim. App. 1981), cert.den. _____ U.S. _____, 102 S. Ct. 2046 (1982). On July 22, 1981, the state district court which convicted Porter set his execution date for August 12, 1981. On August 4, 1981, Porter's petition for habeas corpus relief was denied by the state district court. On August 6, 1982, the Texas Court of Criminal Appeals denied his petition for habeas corpus relief. Thereafter, on August 9, 1982, Porter filed his petition for writ of habeas corpus in this Court alleging that he was in the custody of the State of Texas in violation of the Constitution or laws or treaties of the United States 28 U.S.C. § 2254.

TRUE COPY I CERTIFY
ATTEST:
JESSE E. CLARK, Clerk
By _____ Deputy Clerk

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Porter was found guilty of committing the November 29, 1975, murder of Henry P. Mailloux, a Fort Worth police officer, while the officer was performing his lawful duties. In letters addressed to two different newspapers, Porter confessed to murdering the officer. In his application for federal habeas corpus relief, he asserts five grounds for voiding his conviction. These grounds will be discussed and disposed of in the order in which they are presented in the application.

In his first ground, Porter contends that six prospective jurors were disqualified from serving as jurors in violation of the rule of Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L.Ed.2d 776 (1968). In Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982), the Court held:

> "The seminal case in this area, Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L.Ed.2d 776 (1968), recognized the unconstitutionality of a death sentence imposed by a jury from which veniremen had been excused for cause simply because they expressed general objections to the death penalty or had conscientious or religious scruples against its infliction. The Court held that '[w]hatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution.' Id. at 519, 88 S. Ct. at 1775. The requirements set out in Witherspoon have been echoed by a plethora of subsequent Supreme Court and Fifth Circuit cases. (Citations omitted.) Both Courts accept the state's power to exclude veniremen from a jury on the ground
>
> (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt

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Witherspoon, supra, at 522-23, 88 S. Ct. at 1777 (emphasis in original). At the same time, however, they also recognize that improper exclusion of even one juror on Witherspoon grounds removes from the state the power to impose a sentence of death." Id., at 38-.

The Court further held:

> "Witherspoon and its progeny do not mandate that a prospective juror aver that she would refuse to consider the death penalty in every case that could possible [sic] arise. If she knows enough about the case to know that she could not consider imposition of the death penalty regardless of what evidence might be presented, she must be excused." Id., at 385-386.

A review of the voir dire examination of the six jurors allegedly improperly disqualified in the instant case reveals that each juror unequivocally stated that they would automatically vote against the death penalty regardless of the facts and circumstances that might emerge during the trial. Prospective juror Herndon testified that:

> "Q. As you sit here in the courtroom today, would you automatically vote against the imposition of the death penalty no matter what the trial may reveal?
>
> A. Yes, sir.
>
> * * *
>
> Q. As you sit here now, a lot of these words are not known--as you sit here today, are you irrevocably committed, before trial, to vote against the death penalty regardless of the facts and circumstances that might emerge during the trial?
>
> A. I would vote against the death penalty.
>
> Q. Regardless of what those facts may be?
>
> A. Yes, sir."

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Prospective juror Martinez testified as follows:

"Q. Would you then vote against the death penalty regardless of the facts --

A. Yes, sir.

Q. --based upon your personal belief against the death penalty?

A. Yes, sir.

* * *

Q. Is your personal belief such, then, that you would be -- your vote would be committed before you ever heard the facts, to vote against the death penalty? In other words, are you going to change your mind, or are you pretty firm in your belief against that death penalty?

A. Yes, sir.

Q. Regardless of what the facts may show?

A. Yes, sir.

* * *

Q. What I want to ask you: can you set aside your express convictions and your disbelief in the death penalty and do your duty as a citizen on this jury?

A. No, sir."

Prospective juror Vaughn testified as follows:

"Q. You could never vote for the death penalty, period? Is that what you are telling me?

A. That is what I'm saying.

Q. And if you were called upon to serve as a juror in a capital murder case, would you automatically vote against the death penalty, regardless of what the facts might show during the trial of the case?

A. I would.

Q. You would automatically vote against it?

A. Vote against it, the death penalty."

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Prospective juror Cantu testified as follows:

"Q. Then, I take it, that as you sit here today, because of your belief against the death penalty, you are committed right now, before trial, to vote against the death penalty, regardless of the facts and circumstances that might be brought forth during the trial. Is that correct?

A. Correct, yes, sir."

Prospective juror Rice testified as follows:

"Q. And, therefore, regardless of what the facts may show during the trial in a death penalty case, you would automatically exclude from your consideration the death penalty because of the way you feel about it. Is that true?

A. Yes, sir."

Prospective juror Prue testified as follows:

"Q. Okay. Then, I take it, you would automatically vote against the assessment of the death penalty, regardless of what the facts or evidence may show?

A. [Juror nods affirmatively.]

Q. Because that is your conviction?

A. Right.

* * *

Q. And, you are irrevocably committed before trial to this conviction and belief that you have, regardless of what the evidence may be in the case.

A. Correct."

Upon careful consideration of the record before it, as well as the arguments and authorities of counsel, the Court finds that the six prospective jurors in question were properly disqualified as jurors by the state court. Accordingly, the Court concludes that Porter is not entitled to federal habeas corpus relief on this ground.

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Porter next contends that the state court erred by not ordering a psychiatric examination of him to determine his competency to stand trial, in violation of Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836, 15 L.Ed.2d 815 (1966). Pate established a right to a competency hearing whenever the facts or events presented to the trial court raise a bona fide doubt as to the accused's competency to stand trial.

To obtain federal habeas corpus relief on this ground, the Petitioner has the burden of proving that the trial court had knowledge of objective facts which were sufficient to raise a bona fide doubt as to the Petitioner's mental competency. Reese v. Wainwright, 600 F.2d 1085, 1091 (5th Cir. 1979), cert. den. 444 U.S. 983, 100 S. Ct. 487, 62 L.Ed.2d 410 (1979); Zapata v. Estelle, 585 F.2d 1017, 1020-1022 (5th Cir. 1979). The evidence which Porter contends raised a bona fide doubt as to his competency consists solely of a report which the state's prosecutor found in his case file and promptly turned over to the trial court and Porter's counsel. The report, which is undated, unsigned, and of an unknown origin, states that the Petitioner was sent to the state hospital in Austin from a juvenile detention facility because of hallucinations. This report was apparently written while Porter was a minor, and presumably under the age of twenty-one. At the time of trial he was thirty-seven years old.

Upon careful consideration of the record before it, as well as the argument and authorities of counsel, the Court finds that the report in question is insufficient to

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raise a bona fide doubt as to Porter's competency at the time of trial. The Court therefore concludes that federal habeas corpus relief is not warranted under this ground.

In his third ground, Porter contends that the trial court erred by allowing Officer Hawthorne to testify during the guilt/innocence phase of the trial regarding an oral statement made to him by Porter. The basis for this contention is the alleged violation of a Texas statute which precludes the use of oral statements of the accused which do not lead to discovery of other evidence of guilt. See Texas Code Crim. Proc. Ann., art. 38.22. The Petitioner does not contend that the statement was used in violation of any federal right.

To be entitled to federal habeas corpus relief, the Petitioner must establish a denial of a constitutional right. Jamerson v. Estelle, 666 F.2d 241, 245 (5th Cir. 1982). Questions of state law cannot be raised in a federal habeas corpus proceeding. Llamas-Almaguer v. Wainwright, 666 F.2d 191, 193 (5th Cir. 1982). Porter does not allege, and the Court has not found, a violation of any constitutional right relating to the oral statement in question. Therefore, the Court concludes that Porter is not entitled to habeas corpus relief under this ground.

Porter's fourth contention is that the trial court erred during the guilt/innocence phase of the trial by admitting evidence of an extraneous robbery offense. To be entitled to federal habeas corpus review of an evidentiary ruling such as

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this, the Petitioner must establish that admission of this evidence, if erroneous, was so prejudicial as to constitute a denial of due process. Reese v. Wainwright, 600 F.2d 1035, 1051 (5th Cir. 1979), cert. den. 444 U.S. 981, 100 S. Ct. 487, 62 L.Ed.2d 410 (1979); Crowson v. Alabama, 587 F.2d 244 (5th Cir. 1978), cert. den. 440 U.S. 974, 99 S. Ct. 1542, 59 L.Ed.2d 791 (1979). The Petitioner has failed to establish that the evidence in question was inadmissible or that, even if it was inadmissible, that its use was fundamentally unfair.

Porter's final contention is that the prosecutor, in his final jury argument during the punishment phase of the trial, commented on the failure of Porter to testify in his own behalf. The prosecutor argued that, "there is no sworn testimony" which raised the defense of self-defense. Porter concedes, in his application for habeas corpus relief, that no objection was lodged at the statement in question. This failure to object, under Texas law, operates as a waiver of any error relating to the statement in question. McMahon v. State, 581 S.W.2d 705, 791 (Tex. Crim.App. 1979), cert. den. 444 U.S. 919, 100 S. Ct. 236, 62 L.Ed.2d 175 (1979). No explanation has been advanced as to why no objection was made. The Court therefore finds that any error relating to the statement in question was waived. See Wainwright v. Sykes, 433 U.S. 72, 93, 97 S. Ct. 2497, 2508, 53 L.Ed.2d 594 (1977).

Even if a timely objection had been made, no error would have been shown. The test applied in this circuit for

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determining whether a statement is a comment upon a defendant's failure to testify is whether or not the statement was manifestly intended to be, or was of such character that a jury would naturally and necessarily take it to be, a comment on the failure of the accused to testify. United States v. Streams, 611 F.2d 1201, 1202 (5th Cir. 1979), cert. den. 444 U.S. 1018, 100 S. Ct. 672, 62 L.Ed.2d 648 (1980); United States v. Jennings, 527 F.2d 860, 871 (5th Cir. 1976). The statement in question fails to rise to the level of even an indirect comment on Porter's failure to testify. It certainly cannot be classified as a direct comment prohibited by the Fifth Amendment. See Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L.Ed.2d 106 (1965). The Court therefore concludes that Porter is not entitled to habeas corpus relief under this ground.

The Court, after careful consideration of the entire record before it, as well as the arguments and authorities of counsel, finds, for the above-stated reasons, that Petitioner Henry Martinez Porter is not in the custody of the State of Texas in violation of the Constitution or laws or treaties of the United States. The Court therefore concludes that Porter's application for a writ of habeas corpus relief should be denied.

IT IS THEREFORE ORDERED that the application for a writ of habeas corpus filed by Henry Martinez Porter is denied.

ORDERED this 29th day of October, 1982.

HAYDEN W. HEAD, JR.
UNITED STATES DISTRICT JUDGE

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Order Denying Habeas
(Texas Court of Criminal Appeals)
No. [illegible]

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

EX PARTE HENRY MARTINEZ PORTER	I	APPLICATION FOR STAY OF
	I	EXECUTION AND APPLICATION
	I	FOR POST CONVICTION WRIT OF
	I	HABEAS CORPUS PURSUANT TO
	I	ARTICLE 11.07, V.A.C.C.P.

ORDER ON PETITIONER'S APPLICATION FOR STAY

OF EXECUTION AND APPLICATION FOR WRIT OF HABEAS CORPUS

On this day came to be considered by the Court of Criminal Appeals the Application for Stay of Execution presented by the petitioner, Henry Martinez Porter, in which the petitioner requests this Court to stay his execution which has been scheduled to be carried out on August 12, 1982; and also came on to be considered by the Court of Criminal Appeals the application for post conviction writ of habeas corpus which was filed by petitioner in the 214th District Court of Nueces County pursuant to Article 11.07, V.A.C.C.P.

The Honorable David Diaz, Presiding Judge of the said 214th District Court, entered an order on August 4, 1982, on the application for writ of habeas corpus filed in the trial court denying the request for an evidentiary hearing.

This Court is of the opinion that said application for stay of execution should be denied and that all relief requested in said application for writ of habeas corpus, which is returnable to this Court under Article 11.07, V.A.C.C.P., should be denied.

Therefore, it is ORDERED, ADJUDGED and DECREED by the Court of Criminal Appeals that said application for stay of execution be, and it is hereby, in all things denied; and that all relief requested in said application for writ of habeas corpus be, and it is hereby, in all things denied.

It is so ordered this 6th day of August, 1982.

Per Curiam

En Banc;

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Order Denying Habeas
(Texas District Court)

NO. 79-CR-305-F

HENRY MARTINEZ PORTER	•	IN THE DISTRICT COURT
VS.	•	214TH JUDICIAL DISTRICT
W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS	•	NUECES COUNTY, TEXAS

ORDER

On this day it come to the attention of the Court that the Petitioner, Henry Martinez Porter, has filed an Application for Writ of Habeas Corpus pursuant to Article 11.07 of the Texas Code of Criminal Procedure, which was filed with the District Clerk of Nueces County, Texas, on the 4th day of August, 1982.

The Court is aware that in the Application the Petitioner has made the request that his scheduled execution be stayed and postponed until his Application for Post Conviction Writ of Habeas Corpus has been ruled upon by the Texas Court of Criminal Appeals. This Court entered an Order on July 8, 1982, setting the date for the Petitioner's execution for August 12, 1982. The request by the Petitioner that this Court stay and delay his execution by further Order, is hereby DENIED.

The Court is further aware that the Petitioner, Henry Martinez Porter has also made a request in the Application for Writ of Habeas Corpus he has filed for an evidentiary hearing on the allegations contained therein. The Petitioner's request for an evidentiary hearing on the allegations in his application is hereby DENIED.

SIGNED and ORDERED ENTERED this the 4th day of August 1982.

s/ Alfred Alvarez
JUDGE PRESIDING

STATE OF TEXAS
COUNTY OF NUECES

I, OSCAR SOLIZ, DISTRICT CLERK OF NUECES COUNTY, Texas, do hereby certify that the foregoing is a true and correct copy of the original record, now in my lawful custody and possession, as appears of record in Vol. 6 Page _____ Criminal Min. _____ No. 214 District Court on file in my office. Witness my official hand and seal of office, this 8-9-82

OSCAR SOLIZ, DISTRICT CLERK
Nueces County, Texas
By Teresa Ybarra

DISTRICT COURT NUECES COUNTY TEXAS

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Henry Martinez PORTER, Appellant,

v.

The STATE of Texas, Appellee.

No. 68336.

Court of Criminal Appeals of Texas,
En Banc.

Oct. 21, 1981.

Rehearing Denied Nov. 25, 1981.

On remand after prior appeal, 578 S.W.2d 742, defendant was convicted of capital murder. Defendant appealed from a judgment of the 214th Judicial District Court, Nueces County, Gordon L. Gray, Special Judge. The Court of Criminal Appeals, Dally, J., held that: (1) trial court did not err in its rulings excusing certain jurors or in not attaching jurors who did not respond to summons; (2) no error was shown in not ordering psychiatric examination of defendant; (3) motion for postponement for purpose of conducting weapons test did not comply with rules and presented nothing for review; (4) defendant given chance to review tape recording before its admission and objecting to admission of tape as hearsay should have made specific objection that certain statements on tape were based upon further hearsay, but, in any event, statements were not hearsay where communications between police officers and dispatcher were not offered for truth of matter stated but to show circumstances surrounding and leading to shooting of officer and to show that officer was acting in lawful discharge of official duty; and (5) evidence of commission of offense of armed robbery by defendant 11 days prior to shooting of officer created inference that defendant's motive in shooting officer was to avoid apprehension and was admissible for purpose of showing motive.

Affirmed.

Teague, J., dissented.

1. Jury ⇐67(1)

In view of evidence showing only that several prospective jurors did not respond to summons, with no indication that anyone improperly excused them, trial court did not err in not attaching the jurors. Vernon's Ann.C.C.P. arts. 35.01, 35.07.

2. Jury ⇐67(1)

Statute providing for attachment of absent jurors is directory and not mandatory, and, in any event, defendant failed to establish that he was prejudiced by trial court's failure to grant his request for attachments. Vernon's Ann.C.C.P. arts. 35.01, 35.07.

3. Jury ⇐108

Juror who had earnestly stated her opposition to death penalty and had stated that she would automatically vote against it was properly excused for cause, and her final response that she could set aside her personal convictions and serve and do her duty as juror in capital murder case was not sufficient to rehabilitate her and overcome her earlier testimony.

4. Jury ⇐108

Prospective juror who repeatedly stated he would vote against death penalty regardless of evidence presented and further stated he could not set aside his beliefs if he served on jury was properly excused. Vernon's Ann.C.C.P. art. 37.071; V.T.C.A., Penal Code § 12.31(b).

5. Criminal Law ⇐1043(2)

Where defendant at trial failed to base his objections to excusing of jurors upon *Witherspoon* grounds but, rather, made only general objections, nothing was presented for review.

6. Jury ⇐108

Although testimony of prospective juror was not as definite as those of some others who were excused, it was sufficient to show that she was properly excused for cause in view of, inter alia, her statement that she would answer "No" to special issue questions because of what "Yes" answer would do to her, though she also stated that she believed in death penalty but did not

want to do it herself. Vernon's Ann.C.C.P. arts. 35.01, 35.07.

7. Mental Health ⇐434

Where only evidence that pertained to defendant's incompetency to stand trial was report that was undated, unsigned, and of unknown origin and referred to behavior of defendant when he was boy or young man and he was 37 years old at time of trial, and defendant did not request hearing on incompetency, trial court did not abuse discretion in not ordering psychiatric examination. Vernon's Ann.C.C.P. art. 46.02, §§ 2(a), 3(a).

8. Criminal Law ⇐625

Issue of defendant's incompetency to stand trial is raised if court determines there is evidence to support finding of incompetency to stand trial. Vernon's Ann.C.C.P. art. 46.02, §§ 2(a), 3(a).

9. Criminal Law ⇐603(2), 650

No error was shown in trial court's ruling that defendant could run test on weapons involved in case but that trial would not be delayed for such purpose, request for examination having in fact been granted, and motion for continuance being neither in writing nor sworn to. Vernon's Ann.C.C.P. arts. 29.03, 29.08, 39.14.

10. Criminal Law ⇐1063(1), 1120(3)

Defendant who claimed error in court's declining to grant continuance for examination of weapons failed to perfect record in that defendant did not either file timely motion for new trial with affidavit from expert witness or show under oath what testimony would have been. Vernon's Ann.C.C.P. arts. 29.03, 29.08, 39.14.

11. Criminal Law ⇐1169.2(6)

Where defendant's confession in his letters and his written statements were admitted into evidence and contained same information that appeared in his oral statement, admission of oral statement into evidence did not present reversible error. Vernon's Ann.C.C.P. arts. 38.22, 38.22, subd. 1(e).

12. Criminal Law ⇐436

Tape recording of radio transmissions of police on day that officer was shot and killed was admissible in murder prosecution under Business Record Act and same was true though officer who testified that recording was made in regular course of business, that it was regular course of police department for employee of police with personal knowledge of event to make the recording and that recording was made at same time as events recorded did not have personal knowledge of acts and events preserved on the sound recording, and admission of recording into evidence was not precluded by principle that fundamental trustworthiness of business record must be evident. Vernon's Ann.Civ.St. arts. 3737e, 3737e, § 2.

13. Criminal Law ⇐419(2)

Defendant given chance to review tape recording before its admission and objecting to admission of tape as hearsay should have made specific objection that certain statements on tape were based upon further hearsay, but, in any event, statements were not hearsay where communications between police officers and dispatcher were not offered for truth of matter stated but to show circumstances surrounding and leading to shooting of officer and to show that officer was acting in lawful discharge of official duty. Vernon's Ann.Civ.St. arts. 3737e, 3737e, § 2; V.T.C.A., Penal Code §§ 19.03(a)(1), 19.06; U.S.C.A.Const.Amend. 6.

14. Criminal Law ⇐366(2)

Tape-recorded broadcasts of police officer as he was attempting to stop automobile were admissible as res gestae statements in prosecution for murder of the officer.

15. Criminal Law ⇐342

Evidence of motive is one kind of evidence aiding in establishing proof of alleged offense, and prosecution may always offer evidence to show motive for commission of offense because it is relevant as circumstance to prove commission of offense, though testimony must fairly tend to raise inference in favor of existence of motive on part of accused to commit alleged offense.

16. Homicide ⇐166(1)

Evidence of commission of offense of armed robbery by defendant 11 days prior to shooting of police officer created inference that defendant's motive in shooting officer was to avoid apprehension and was admissible, in prosecution for murder of officer, for purpose of showing motive.

John M. Anderson, Fort Worth, J. Douglas Tinker, Corpus Christi, on appeal only, for appellant.

Tim Curry, Dist. Atty., C. Chris Marshall, Rufus Adcock and Joe C. Lockhart, Asst. Dist. Attys., Fort Worth, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

DALLY, Judge.

This is an appeal from a conviction for the offense of capital murder. The punishment is death. The appellant had been previously tried and convicted for the same offense but the judgment was reversed and cause remanded in *Porter v. State*, 578 S.W.2d 742 (Tex.Cr.App.1979). The case was retried in Nueces County after the venue was changed from Tarrant County.

The appellant asserts that the trial court erred in the following ways: by overruling his challenge to the array of the jury panel, by excusing improperly for cause several prospective jurors, by not ordering a psychiatric examination of the appellant, by not allowing the appellant's expert to examine the weapons that were introduced in evidence, by admitting an oral statement of the appellant made while he was in custody, by admitting in evidence a tape recording of police communications, and by allowing in evidence testimony concerning an extraneous offense.

The appellant in his first five grounds of error complains that the trial court erred in overruling his challenge to the array of the jury panel and in refusing to issue attachments for those who had been summoned but had not reported for jury duty.

The appellant filed a written challenge to the array pursuant to Art. 35.07, V.A.C.C.P. alleging that "jurors have been excused by individuals not authorized by law to excuse them such as deputy clerks and other law enforcement officers." A hearing was held and the appellant presented the testimony of Charles Nay. Nay testified that he was the court administrator and that he had for the court issued the summons for the jury. He stated that in each of the two groups summoned not all of the summoned jurors had appeared. He said some had legal excuses but a large number did not respond at all to the summons. Nay stated that he did not know whether or not someone who was not authorized by law had excused these jurors. However, he added that more than likely the ones not appearing had moved out of the county. The appellant, after the hearing, requested that each juror who had not responded be attached. The request was denied and appellant's challenge to the array was overruled.

[1, 2] We conclude that the trial court did not err in its rulings. Art. 35.07, supra, states:

> "Each party may challenge the array only on the ground that the officer summoning the jury has wilfully summoned jurors with a view to securing a conviction or an acquittal. All such challenges must be in writing setting forth distinctly the grounds of such challenge. When made by the defendant, it must be supported by his affidavit or the affidavit of any credible person. When such challenge is made, the judge shall hear evidence and decide without delay whether or not the challenge shall be sustained."

The evidence presented by the appellant fails to show that a person unauthorized by law excused the prospective jurors or that a person "wilfully summoned jurors with a view to securing a conviction or an acquittal." The evidence only shows that several prospective jurors did not respond to the summons; nothing indicates that someone improperly excused them. See *Dent v. State*, 504 S.W.2d 455 (Tex.Cr.App.1974).

The trial court did not err in not attaching the jurors. Art. 35.01, V.A.C.C.P., which provides for the attachment of absent jurors, is directory and not mandatory. *Moreno v. State*, 587 S.W.2d 405 (Tex.Cr.App. 1979); *Dent v. State*, supra. The appellant has failed to establish that an injury occurred by the trial court's failure to grant his request for attachments. *Moreno v. State*, supra; *Dent v. State*, supra; *Esquivel v. State*, 595 S.W.2d 516 (Tex.Cr.App. 1980). No abuse of discretion has been shown; appellant's grounds of error are overruled.

[3] In his next eighteen grounds of error the appellant contends that the trial court improperly excused for cause six jurors. The first juror, Susan Pace Herndon, was improperly excused, the appellant argues, because the following exchange from the final question asked the juror shows that under the holding of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) she was qualified to serve:

"Q. Despite the convictions that you have, can you put those aside, if you were on this jury, and do your duty as a citizen? Despite what your personal convictions may be, could you set those aside and serve, and do your duty as a juror in a capital murder case?

"A. Yes, I could do my duty as a juror."

However, Herndon previously testified that she had a long standing belief against the death penalty, that she could never impose it, and that she would vote automatically against the imposition of the death penalty no matter what the evidence at trial revealed. When asked by defense counsel if there was any way he could get her to agree that there are some cases where she thought the death penalty was a possibility, she responded there was not.

The entire voir dire examination of Susan Herndon was quite short and when taken as a whole makes it unmistakably clear her views "would prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oaths and would prevent [her] from consider[ing] and decid[ing] the facts impartially and conscientiously apply[ing] the law as charged by the court." *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Witherspoon v. Illinois*, supra. The appellant apparently argues that the final response by the juror that she could do her duty as a juror demonstrates that she was qualified to serve as a juror under *Witherspoon*. Indeed the appellant makes the same argument concerning the other excused veniremen; however, the argument is without merit. The question was very broad and provided little, if any, insight into her ability to serve as a juror. Nothing in the juror's response indicates that she was willing to follow the trial court's instructions and base her decision upon the evidence presented. The final question and answer were not sufficient to rehabilitate the juror and overcome her earlier testimony that she would automatically vote against the imposition of the death penalty regardless of the facts and circumstances that might emerge during the trial. *Vigneault v. State*, 600 S.W.2d 318 (Tex.Cr. App.1980). Appellant's reliance upon *Burns v. Estelle*, 592 F.2d 1297 (5th Cir. 1979) aff'd 626 F.2d 396 (5th Cir. 1980) is misplaced. In *Burns* a prospective juror stated three times she was opposed to the death penalty and its possible infliction would affect her deliberations. She was excused for cause and she was asked no further questions. The court vacated judgment, stating that the juror was not disqualified under *Witherspoon* and that other questions should have been propounded to the juror. This is clearly not the case with this venireman. She had earnestly stated her opposition to the death penalty and she would automatically vote against it. The juror was properly excused for cause. *Witherspoon v. Illinois*, supra; *Vigneault v. State*, supra; *Ex parte Chambers*, 612 S.W.2d 572 (Tex.Cr. App.1981); *Sanne v. State*, 609 S.W.2d 762 (Tex.Cr.App.1980); *Russell v. State*, 598 S.W.2d 238 (Tex.Cr.App.1980) cert. denied, 449 U.S. 1003, 101 S.Ct. 544, 66 L.Ed.2d 300.

[4] The appellant also complains that venireman Zeon Martinez, Jr. was improperly excused for cause. Martinez when questioned during the voir dire examination stated he did not have any objection when told the punishment for capital murder was either life or death. However, when asked if he could assess the death penalty he stated that he could not. He stated that it was a strong belief and when asked if he would vote against the death penalty regardless of the facts he said yes. The prosecutor then explained the special issue questions under Art. 37.071, V.A.C.C.P. that the jury would have to answer. The juror stated he would automatically vote "No" to the questions because he would not want to sentence a man to death regardless of the facts and evidence. When asked on cross-examination if he could set aside his beliefs and do his duty as a citizen serving on this jury, Martinez said no. When asked how it would affect his deliberations Martinez stated that he had never killed anyone, that it would be on his conscience, and that he would worry about it when deciding the case.

The appellant argues that Martinez was qualified under *Witherspoon* and that the trial court excused him under V.T.C.A. Penal Code, Sec. 12.31(b) in violation of the holding in *Adams v. Texas*, supra. The contention is without merit. The juror repeatedly stated he would vote against the death penalty regardless of the evidence presented and further stated he could not set aside his beliefs if he served on the jury. The juror was properly excused; no error has been shown. *Vigneault v. State*, supra; *Ex parte Chambers*, supra; *Sanne v. State*, supra. Compare *Grijalva v. State*, 614 S.W.2d 420 (Tex.Cr.App.1981).

The appellant next asserts that venireman Alonzo Vaughn was excused in violation of the principles of *Witherspoon*. Mr. Vaughn testified that he had a long-standing belief against the death penalty. He stated several times that he would always vote against the death penalty regardless of the facts.

The appellant argues that despite these statements Vaughn was improperly excused because he qualified his feelings by saying, "You know, what I'm saying, that is my feeling. I would not vote for the death penalty, is my feelings *now*." Additionally the appellant relies upon the following testimony:

"Q. And could you set aside right now and later to the evidence and honestly answer whatever questions you are required to answer?

"A. I'm willing to listen to the evidence to see what—it could be different, I don't know. But, my feeling now, as it stands now—

* * * * * *

"Q. Could you listen to the evidence in the case, and do your duty as a citizen; despite the feeling you have about the death penalty? What you do is going to depend on the evidence; is that right?

"A. Yeah, I imagine so. It would—if I'm understanding you right."

When re-examined by the State, the process of reaching a verdict through the special issue questions under Art. 37.071, supra, was again explained to the juror. He then stated he would automatically vote "No" to the special issues.

Venireman Vaughn's testimony is unmistakeably clear that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him. The appellant's contention is devoid of merit. *Lockett v. Ohio*, supra; *Vigneault v. State*, supra; *Ex parte Chambers*, supra; *Sanne v. State*, supra.

[5] The appellant asserts that Exiquio Cantu and Beth Prue were improperly excused. Initially, we note that the appellant at trial failed to base his objections to the excusing of the jurors upon *Witherspoon* grounds. Only general objections were made, nothing is presented for review. *May v. State*, 618 S.W.2d 333 (Tex.Cr.App. 1981). Nonetheless we have examined the voir dire of these jurors and agree that they

were properly excused. Mr. Cantu stated that he did not believe in the death penalty, that he could never impose it regardless of the facts, and that he would always vote against it, regardless of the facts and circumstances presented during the trial. Mrs. Prue stated that she also did not believe in capital punishment, that she would vote against it regardless of the evidence presented and would vote "No" to the special issue questions to avoid imposing the death penalty. The two veniremen were properly excused. *Lockett v. Ohio*, supra; *Vigneault v. State*, supra; *Ex parte Chambers*, supra; *Sanne v. State*, supra.

[6] The appellant in his final complaint about the excused prospective jurors argues that Joyce Rice was qualified under *Witherspoon* and should not have been excused. Again the appellant failed to make a specific objection when Mrs. Rice was excused and nothing is presented for review. *May v. State*, supra. We nonetheless have reviewed the voir dire examination of Mrs. Rice. While her testimony is not as definite as the previously discussed veniremen it is sufficient to show that Mrs. Rice was properly excused for cause. During direct examination she stated she was not opposed to the death penalty but could not live with herself if she participated in returning a death penalty. When asked if she would exclude the death penalty regardless of what the facts revealed she said, "I would assume, yes." She later added that she would answer "No" to the special issue questions because of what a "Yes" answer would do to her. On cross-examination the juror stated she believed in the death penalty but did not want to do it herself. She indicated she could set aside her reluctance and determine guilt or innocence. However, when asked if she could set aside this reluctance and "do your duty as a citizen and make whatever decision based upon the evidence before you that the law might require" she said she did not know. On redirect the following occurred:

"Q. . . .[C]an you sit in judgment in this case . . . and assume the full responsibility of a juror and be fair to both sides as to the facts and the punishment and take that oath of office.

"A. No.

* * * * * *

"Q. . . .[W]ould you vote against the death penalty as a juror in a capital murder case, regardless of the facts and circumstances that might emerge during the trial of the case?

"A. Yes, sir.

"Q. And, as you sit here right now, are you irrevocably committed at this time to vote against the death penalty, regardless of the facts and circumstances that might emerge during the trial?

"A. Yes, sir."

This testimony of the venireman made it clear that she could not be trusted to abide by existing law or follow conscientiously the instructions of the trial judge. *Lockett v. Ohio*, supra; *Vigneault v. State*, supra; *Ex parte Chambers*, supra; *Sanne v. State*, supra. No error has been shown.

[7, 8] The appellant in four grounds of error contends that the trial court erred in not ordering a psychiatric examination of the appellant after the court became aware that the appellant had had psychiatric problems in the past. After the selection of the jurors but prior to the offer of any evidence before them, the prosecution notified the trial court and defense counsel that they had found a document concerned with the appellant in their files. The document was described as an incomplete report and it was neither signed nor dated. Under the heading "Social History" it stated that the appellant was sent to a hospital in Austin and that he escaped. Under the heading "Military History" the document stated that the appellant was sent to the State Hospital at Austin from the Waterville State School for Boys because appellant had hallucinations of seeing his father. It stated that appellant later ran away from the hospital. This document does not appear in the record before us.

The day after the State informed defense counsel about the document, appellant's attorney requested that the trial court appoint a psychiatrist to examine the appellant and determine his competency to stand trial. He, however, conditioned his request upon an agreement that the results of the examination would not be used during the punishment phase of the trial. The trial court refused to agree and the appellant withdrew his motion.

The appellant first argues that the trial court erred in not granting his motion that the results of any psychiatric examination for competency not be used in the punishment phase. This Court in the past has ruled that no error occurred when an accused was examined by a psychiatrist to determine competency but later testified as to the accused's future dangerousness at the punishment stage of the trial. *Hammett v. State*, 578 S.W.2d 699 (Tex.Cr.App. 1979), petition for cert. withdrawn 448 U.S. 725, 100 S.Ct. 2905, 65 L.Ed.2d 1086; *Gholson v. State*, 542 S.W.2d 395 (Tex.Cr.App. 1976), cert. denied 432 U.S. 911, 97 S.Ct. 2960, 53 L.Ed.2d 1084; *Livingston v. State*, 542 S.W.2d 655 (Tex.Cr.App.1976), cert. denied 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250. These decisions occurred before the recent Supreme Court opinion in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) and their continuing viability may be questioned. However, we do not need to reach that issue in order to make a proper disposition of the matter before us. Here, no psychiatric testimony from a competency examination was admitted during the punishment phase of the trial. Thus the only question raised is whether the trial court erred in not ordering a psychiatric examination of the appellant.

Art. 46.02, Sec. 3(a), V.A.C.C.P. provides, as follows:

> "At any time the issue of the defendant's incompetency to stand trial is raised, the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health or mental retardation to examine the defendant with regard to his competency to stand trial and to testify at any trial or hearing on this issue."

The issue of a defendant's incompetency to stand trial is raised if "the court determines there is evidence to support a finding of incompetency to stand trial." Art. 46.02, Sec. 2(a), supra. In *Sisco v. State*, 599 S.W.2d 607 (Tex.Cr.App.1980) we stated:

> "We are, therefore, constrained to hold that, in determining after hearing held in advance of a trial on the merits whether 'there is evidence to support a finding of incompetency to stand trial,' the trial court is to assay just that evidence tending to show incompetency, putting aside all competing indications of competency, to find whether there is some evidence, a quantity more than none or a scintilla, that rationally may lead to a conclusion of incompetency."

In the case before us the only evidence that pertains to the appellant's incompetency to stand trial is a report that was undated, unsigned, and of unknown origin. The behavior mentioned in the report apparently occurred when the appellant was a boy or a young man; the appellant was thirty-seven years old at the time of the trial. The behavior in the report does not give any indication that the appellant did not have a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" or "a rational as well as factual understanding of the proceedings against him." No other evidence concerning the appellant's competency was presented and appellant's behavior throughout the trial was not such as to raise any issue of his incompetency. The appellant did not request a hearing on incompetency. There was simply no evidence whatsoever offered which dealt with the appellant's present incompetency to stand trial. We conclude that the trial court did not abuse its discretion in not ordering a psychiatric examination of the appellant. *Sisco v. State*, supra. Compare *Stiehl v. State*, 585 S.W.2d 716 (Tex.Cr.App.1979) cert. denied 449 U.S.

1114, 101 S.Ct. 926, 66 L.Ed.2d 843; *Bowens v. State*, 507 S.W.2d 785 (Tex.Cr.App. 1974); *Hill v. State*, 429 S.W.2d 481 (Tex.Cr.App.1968) cert. denied 393 U.S. 955, 89 S.Ct. 384, 21 L.Ed.2d 367.

The appellant also complains that the prosecution should have revealed the information contained in the document prior to the selection of the jury. Compare *Ex parte Lewis*, 587 S.W.2d 697 (Tex.Cr.App. 1979). However, the record reveals that the prosecution informed the appellant about the document as soon as they became aware of it. No error is shown.

The appellant in his next two grounds of error contends that the trial court erred in not allowing the appellant's own expert to examine the weapons introduced in evidence and in not granting a postponement of the trial to allow time for his expert to examine the weapons.

[9] In a motion in limine the appellant prior to trial requested the opportunity to have his own expert examine and run tests on the weapons involved in the case. The trial court at a pretrial proceeding told the appellant he could run the tests "if he wants to." Later that day the appellant requested that the trial be postponed or delayed in order for his expert to conduct the examinations and tests. The court denied the request for the continuance noting, "You can do it during the trial if you want to, but I'm not going to delay the trial to do it." The following day, the appellant informed the court that the expert he intended to use was unable to make the tests. Appellant stated he was trying to contact another particular expert. Another request for postponement was denied. Less than a week later while the jury was being selected, the trial court, at the request of the State, asked about the status of the appellant's expert. Appellant's counsel stated that he had not contacted the expert. The defense at trial did not present the testimony of an expert witness.

The appellant contends that his request to allow an expert to examine the evidence was denied and thus is violation of Art. 39.14, V.A.C.C.P. See *Terrell v. State*, 521 S.W.2d 618 (Tex.Cr.App.1975); *Detmering v. State*, 481 S.W.2d 863 (Tex.Cr.App.1972). However, a review of the record, as already outlined makes it clear that the trial court did in fact grant appellant's request. This contention is without merit.

Appellant further argues that it was error not to grant his request for a postponement. Art. 29.03, V.A.C.C.P. provides as follows:

> "A criminal action may be continued on the written motion of the State or of the defendant, upon sufficient cause shown: which cause shall be fully set forth in the motion. A continuance may be only for as long as is necessary."

Art. 29.08, V.A.C.C.P. states:

> "All motions for continuance on the part of the defendant must be sworn to by himself."

Appellant's motion was neither in writing nor was it sworn to; nothing is presented for review. *Minx v. State*, 615 S.W.2d 748 (Tex.Cr.App.1981); *Allen v. State*, 505 S.W.2d 923 (Tex.Cr.App.1974).

[10] Additionally we note that the appellant did not perfect the record by filing a timely motion for new trial with an affidavit from an expert witness or by showing under oath what the testimony would have been. *Minx v. State*, supra. The grounds of error are overruled.

[11] The appellant next contends that his oral statement while in custody to a police officer was improperly admitted in evidence. Officer Clinton Hathorne testified that on December 1, 1975, he and other peace officers went to an apartment located in San Antonio to execute an arrest warrant for the appellant. After entering the apartment the officers found the appellant, placed him under arrest, and informed him of his rights. Officer Hathorne stated that after this was completed he saw three sealed envelopes in plain view on a table. One was addressed to the editor of the San Antonio News, another to the editor of the San Antonio Light, and the last to Harry Nass, Attorney at Law. Hathorne asked the appellant if the letters belonged to him

and appellant replied that they were his. He added that they contained his confession to a murder and would clear his brother-in-law of any involvement in the murder of the Fort Worth policeman. Appellant argues that his oral statements were inadmissible under Art. 38.22, V.A.C.C.P.

Art. 38.22(1)(e), supra, then in effect stated the following:

"The oral or written confession of a defendant made while the defendant was in jail or other place of confinement or in the custody of an officer shall be admissible if:

"• • •

"(e) It be made orally and the defendant makes a statement of facts and circumstances that are found to be true, which conduce to establish his guilt, such as the finding of secreted or stolen property, or the instrument which he states the offense was committed."

Appellant contends that his statements did not lead to the discovery of evidence tending to establish his guilt. See *Scott v. State*, 564 S.W.2d 759 (Tex.Cr.App.1978); *Smith v. State*, 514 S.W.2d 749 (Tex.Cr.App. 1974). Compare *Ashley v. State*, 362 S.W.2d 847 (Tex.Cr.App.1962) cert. denied 372 U.S. 956, 83 S.Ct. 955, 10 L.Ed.2d 10; *Chase v. State*, 508 S.W.2d 605 (Tex.Cr.App. 1974) cert. denied 419 U.S. 840, 95 S.Ct. 71, 42 L.Ed.2d 68.

The contention is without merit. A review of the record reveals that the same information contained in the oral statement was obtained from other sources. Officer Cole, a Fort Worth policeman, testified that Officer Hathorne gave him the three envelopes. Cole obtained oral and written consent from the appellant to open and examine the letters. Each envelope contained the same letter, which appeared to be in the same handwriting and each was signed Henry Martinez Porter. The letter read as follows:

"S. A. News, To Whom It May Concern: This is my confession to the death of the Fort Worth Police Officer which no one else was involved in but myself. I have read in the newspapers that the police are trying involving my former brother-in-law because his car that I had was in his name. However, my brother-in-law had nothing to do with the death or anything else that I have done. I had bought the car from him about four months ago and since I hadn't yet finished paying for the car, the title was still in his name. However, the car was mine and belonged to me and its responsibility lies with me. I haven't seen my brother-in-law for four months and I wish to make this clear. So, any statements by any of these persons trying to involve anyone else for my wrongdoings are false. This is my true statement. Signed, Henry M. Porter. Three copies have been made by me, one each to the news media and one to Mr. Nash, Attorney, who has been my former brother-in-law's attorney."

Additionally the appellant introduced in evidence the statement he made to Officer Cole on the day following his arrest. It stated in part:

"Last night when I was arrested I had three letters that I had written. I told one of the San Antonio Officers that the letters were about the Fort Worth Policeman being shot and that they showed that Eddie Rodriquez did not have anything to do with shooting the Policeman.

"Tonight I have signed a consent that was read and explained to me by Det. Cole saying that I did not object to him opening the letters."

The appellant's confession in the letters and his written statement contain the same information that appeared in his oral statement. The admission of that statement does not present reversible error. *Brantley v. State*, 522 S.W.2d 519 (Tex.Cr.App.1975); *Gutierrez v. State*, 502 S.W.2d 746 (Tex.Cr. App.1973).

[12] In his next ground of error the appellant asserts that a tape recording and a transcript of the tape were improperly admitted in evidence. The tape had recorded the radio transmissions of the police on the day Officer Mailloux, the deceased, was shot.

Sergeant R. D. Burchfield testified that radio communications of the Fort Worth Police Department were continuously recorded twenty-four hours a day. The recording admitted in evidence was a portion of that tape. He stated that he had care, custody, and control of the tape and that the tape was prepared in the ordinary course of business of the police department. Burchfield further testified that it was in the ordinary course of business for an employee or officer to have personal knowledge of the transmissions and broadcasts recorded on the tape. He added that the entries on the tape were made contemporaneously with the events they described. He stated that he was not present when the recordings were made, but that no changes in the tape had been made. Thomas Johnson testified that he was a civilian dispatcher for the police and was working on the day of the shooting. He said that the recording was accurate and that no alterations had been made to it. He added that he could identify all the voices on the tape, either by recognizing the sound of their voices or by their call number. The portion of tape about which the appellant complains is as follows:

"(08:39:46) (YOUNG) '350—Do you know—or did they leave you a note on the console—about that car wanted on the armed robbery at Almers Grocery on Hemphill? Do you know if it was picked up last night or not?'

"(08:40:01) (DISPATCHER) 'I have nothing on it 350. No notes, no nothing.'

"(08:40:04) (YOUNG) '10–4.'

"(08:40:28) (MAILLOUX) '351 to headquarters. Do you want the year, color, and make car that suspect's driving?'

"(08:40:36) (DISPATCHER) 'I think we found one here. Channel C had it on a 36, 3723 Hemphill. Red pickup with a camper.'

"(08:40:46) (MAILLOUX) 'No. This one is on that Mexican male that has been hitting us all over town. He was seen yesterday in a white '66 Ford Edward Sam Davis 695.'

"(08:40:58) (DISPATCHER) 'Edward Sam David 695?'

"(08:41:02) (MAILLOUX) '351–10–4. Spotted it at Hemphill and Magnolia, supposed to be that same one—that hit, I believe it was 2628 Hemphill last week.'

"(08:41:13) (DISPATCHER) 'Okay. I don't know whether they got that one or not.' "

The following portion of the tape was also admitted:

"(08:56:06) (MAILLOUX) '351—Edward Sam David 695 36 Suspect turning north on Lipscomb off West Rosedale.'

"(08:56:13) (DISPATCHER) 'Lipscomb and West Rosedale.'

"(08:56:14) (MAILLOUX) 'Correction. He's still going on west. Had his turn indicator signal on.'

"(08:56:28) (DISPATCHER) 'Any unit around Lipscomb and Rosedale get with 351 on this 36 suspect.'

"(08:56:35) (MAILLOUX) 'He's turning north on College.'

"(08:56:37) (DISPATCHER) 'Northbound on College now.'

"(08:56:42) (YOUNG) '350—Be careful about going around (unintelligible).'

"(08:56:46) (MAILLOUX) '10–4.'

"(08:56:52) (YOUNG) '350—Any unit that can get with 351 over there, that suspect is armed I suspect.'

"(08:56:58) (MORTON) '359—I'm headed that way, what's his 20 now?'

"(08:57:02) (DISPATCHER) 'Last seen northbound on College from about Rosedale.'

"(08:57:04) (MAILLOUX) 'He's southbound on College. He's turning back. Correction I think he's going to pull over.'

"(08:57:16) (DISPATCHER) '359, your 20?'

"(08:47:18) (MORTON) '359—I'm southbound on Rosedale. What hundred block of College is he in?'

"(08:57:23) (MAILLOUX) '351—1200 College.'

"(08:57:24) (DISPATCHER) '1200 College.'

"(08:57:27) (MORTON) 'I'm on my way.'

"(08:57:49) (UNIDENTIFIED UNIT) 'Did he say 1100 College?'

"(08:57:52) (DISPATCHER) '1200.'

"(08:58:08) (DISPATCHER) '353?'

"(08:58:11) (WALLACE) '353—Go ahead.'

"(08:58:12) (DISPATCHER) 'Go over to Jennings and Pennsylvania, Jennings and Pennsylvania with Unit 149.'

"(08:58:19) (WALLACE) '353—10—4. Same sheet.'

"(08:58:22) (MALONE) '355—I've got an officer shot here, send some help!' "

The appellant did not at trial and does not now on appeal complain that the proper predicate, as required under *Edwards v. State*, 551 S.W.2d 731 (Tex.Cr.App.1977), was not established for the admission of a sound recording. Rather appellant contends that the statements on the tape were hearsay and their admission denied him his right to confrontation and prejudiced his defense.

We do not agree with the appellant's contentions. The Business Record Act, Art. 3737e, V.A.C.S., is a codification of the business record exception to the hearsay rule. It provides that a business record is admissible as evidence of an event if (1) it was made in the regular course of business, (2) it was the regular course of that business for an employee of that business with personal knowledge of the event to make a record, and (3) it was made at or near the time of the event. The tape was admissible as a business record as an exception to the hearsay rule. Officer Burchfield testified that the recording was made in the regular course of business, that it was the regular course of the police department for an employee of the police with personal knowledge of the event to make the recording, and the recording was made at the same time as the events recorded. The appellant argues that Officer Burchfield did not have personal knowledge of the acts and events preserved on the sound recording. However, Section 2 of the Business Records Act states in part:

"The identity and mode of preparation of the memorandum or record in accordance with the provisions of paragraph one (1) may be proved by the testimony of the entrant, custodian, or other qualified witness even though he may not have personal knowledge as to the various items or contents of such memorandum or record."

Officer Burchfield testified he was the custodian of the sound recording; the appellant's contention is without merit. A proper predicate for the admission of the tape recording as a business record was established.

The appellant further argues that even if the proper predicate had been laid for the admission of the tape under Art. 3737e, supra, the tape nonetheless should not have been admitted in evidence. He contends that the tape does not have "the indicia of reliability to insure the integrity of the fact-finding process commensurates with the constitutional right of confrontation and cross-examination." *McCrary v. State*, 604 S.W.2d 113 (Tex.Cr.App.1980); *Sisson v. State*, 561 S.W.2d 197 (Tex.Cr.App.1978); *Battee v. State*, 543 S.W.2d 91 (Tex.Cr.App. 1976); *Coulter v. State*, 494 S.W.2d 876 (Tex.Cr.App.1973). We have stated that even though the formal requirements for admissibility of a business record may be shown, the business record should not be automatically admitted in evidence. The fundamental trustworthiness of the record must be evident. *Coulter v. State*, supra.

However, in the case at bar the fundamental trustworthiness of the recording cannot be questioned. In our holdings in *McCrary*, *Sisson*, *Battee*, and *Coulter* the business records admitted in evidence were without a doubt prepared in anticipation of prosecution. The tape recording in the instant case was not made with a specific view toward prosecution in mind. As a matter of fact it is a rare situation in which such a recording would provide any probative value to a case. The sound recording allowed the police department to review the procedures used by their officers and to insure that information transmitted was accurately recorded. The appellant does not complain that the tape was inaccurate nor is there any indication in the record that it

is inaccurate. We, therefore, conclude that the sound recording was of such trustworthiness as to guarantee the same protection provided by the rights of confrontation and cross-examination. *Burleson v. State*, 585 S.W.2d 711 (Tex.Cr.App.1979); *United States v. Verlin*, 466 F.Supp. 155 (N.D.Tex. 1979).

[13, 14] The appellant apparently also argues that the statements contained on the tape are hearsay upon hearsay. He contends that while the tape may be admissible under Art. 3737e, supra, statements appearing on tape are themselves hearsay and not admissible. See *Smith v. Riviere*, 248 S.W.2d 526 (Tex.Civ.App.—Texarkana 1951), no writ history. However, we initially note that the appellant's objection to the admission of the tape was based upon the tape itself being hearsay. The appellant, even though he was given a chance to review the recording before its admission, failed to make a specific objection that certain statements on the tape were based upon further hearsay. The appellant failed to bring to the court's attention which statements he believed to be additional hearsay and should be excised from the remainder of the tape recording. Nonetheless we have reviewed the statements recorded on the tape and conclude that they are not hearsay.

It is well established that an extra-judicial statement or writing offered for the purpose of showing what was said rather than for the truth of the matter stated therein does not constitute hearsay. *Nixon v. State*, 587 S.W.2d 709 (Tex.Cr.App.1979); *Norton v. State*, 564 S.W.2d 714 (Tex.Cr. App.1978); *Gholson v. State*, 542 S.W.2d 395 (Tex.Cr.App.1976) cert. denied 432 U.S. 911, 97 S.Ct. 2960, 53 L.Ed.2d 1084. Compare *Elder v. State*, 614 S.W.2d 136 (Tex.Cr. App.1981). The communications between the police officers and the dispatcher were not offered for the truth of the matter stated. It was offered to show the circumstances surrounding and leading to the shooting. See *Nixon v. State*, supra; V.T. C.A. Penal Code, Sec. 19.06. Additionally, the statements were offered to show that the officer was "acting in the lawful discharge of an official duty." V.T.C.A. Penal Code, Sec. 19.03(a)(1). Finally, the broadcasts of deceased as he was attempting to stop the automobile were admissible as res gestae statements. *Trostle v. State*, 588 S.W.2d 925 (Tex.Cr.App.1979); *Corbett v. State*, 493 S.W.2d 940 (Tex.Cr.App.1973) cert. denied 414 U.S. 1131, 94 S.Ct. 871, 38 L.Ed.2d 756. The sound recording was properly admitted in evidence; the appellant's ground of error is overruled.

In the appellant's remaining ground of error he asserts that it was error to allow in evidence testimony about an extraneous offense. At trial Susan Chandler testified that on November 18, 1975, the appellant robbed her at gunpoint. During the robbery the appellant knocked her unconscious. The court instructed the jury that it could consider the evidence of extraneous offense only for the purpose of determining the intent and motive of appellant. The appellant offered no objection to the instruction.

[15] This Court has repeatedly stressed that an accused shall not be tried for some collateral crime or for being a criminal generally. *Albrecht v. State*, 486 S.W.2d 97 (Tex.Cr.App.1972). This as a general rule evidence of extraneous offenses is inadmissible; however, several exceptions to the general rule exists. *Yarbrough v. State*, 617 S.W.2d 221 (Tex.Cr.App.1981). Evidence of an extraneous offense which shows an accused's motive or intent is admissible if it is material and its relevancy to a material issue outweighs its prejudicial potential. *Yarbrough v. State*, supra; *Albrecht v. State*, supra.

Appellant argues that since it is not necessary to establish motive in order to sustain a conviction for murder, *Garcia v. State*, 495 S.W.2d 257 (Tex.Cr.App.1973), evidence of an extraneous offense showing motive should not be admitted. However, this ignores that evidence of motive is one kind of evidence aiding in establishing proof of an alleged offense. *Rodriquez v. State*, 486 S.W.2d 355 (Tex.Cr.App.1972). Thus the prosecution may always offer evidence to show motive for the commission of an

offense because it is relevant as a circumstance to prove the commission of the offense. Of course, the testimony must fairly tend to raise an inference in favor of the existence of a motive on the part of the accused to commit the alleged offense. *Rodriquez v. State*, supra.

[16] The evidence in this case reveals the commission of the offense of armed robbery by the appellant eleven days prior to the shooting. It is apparent that the evidence of the extraneous offense creates an inference that the appellant's motive in shooting the deceased was to avoid apprehension. The trial court did not err; the evidence was admissible for the purpose of showing motive. *Barefoot v. State*, 596 S.W.2d 875 (Tex.Cr.App.1980); *Hughes v. State*, 563 S.W.2d 581 (Tex.Cr.App.1978) cert. denied 440 U.S. 950, 99 S.Ct. 1432, 59 L.Ed.2d 640; *Yarbrough v. State*, supra; *Russell v. State*, 598 S.W.2d 238 (Tex.Cr. App.1980). The ground of error is overruled.

The judgment is affirmed.

CLINTON, J., not participating.

TEAGUE, J., dissents. See dissenting opinion in *Williams v. State*, 622 S.W.2d 116 (Tex.Cr.App.1981).

KEY NUMBER SYSTEM

Jimmy KRUGER, Appellant,

v.

The STATE of Texas, Appellee.

No. 60696.

Court of Criminal Appeals of Texas, Panel No. 2.

Oct. 28, 1981.

Defendant was convicted in the 211th Judicial District Court, Denton County, Sam Houston, J., of rape of a child and he appealed. The Court of Criminal Appeals, Onion, P. J., held that statute governing rape of a child is not unconstitutional on ground that it invidiously discriminates against males.

Affirmed.

Clinton, J., dissented and filed opinion.

Constitutional Law ⇐224(5)
Rape ⇐2

Statute governing rape of a child is not unconstitutional on ground that it invidiously discriminates against males. V.T. C.A., Penal Code § 21.09; Vernon's Ann. Const.Art. 1, § 3a; U.S.C.A.Const.Amend. 14.

Michael W. George, William L. Smith, Jr., Denton, for appellant.

Jerry W. Cobb, County Atty., and David Bays, Asst. County Atty., Denton, Robert Huttash, State's Atty., Austin, for the State.

Before ONION, P. J., and TOM G. DAVIS and CLINTON, JJ.

OPINION

ONION, Presiding Judge.

This is an appeal from a conviction for rape of a child, where the punishment was assessed by the jury at ten (10) years' imprisonment and a fine of $5,000.00, probated.

On appeal appellant's sole ground of error is the conviction is based upon V.T.C.A., Penal Code, § 21.09, which statute is unconstitutional in that it invidiously discriminates against males in violation of the Fourteenth Amendment, United States Constitution, and Article I, § 3a of the Texas Constitution.

This same contention was raised in and answered adversely to appellant's argument

Henry Martinez PORTER, Appellant,

v.

The STATE of Texas, Appellee.

No. 57553.

Court of Criminal Appeals of Texas,
En Banc.

March 28, 1979.

Defendant was convicted in the Criminal District Court, No. 4, Tarrant County, Gordon L. Gray, J., of capital murder, and defendant appealed. The Court of Criminal Appeals, Dally, J., held that error occurred in permitting, over objection, at punishment phase of trial, introduction of letters, reports, and documents from a federal parole officer's file pertaining to defendant's supervision and progress while on federal parole, where such evidence did not have indicia of reliability sufficient to insure integrity of fact-finding process commensurate with constitutional rights of confrontation and cross-examination and it was by no means clear that writings were official written instruments within meaning of statute, which permits introduction in evidence of official public records or certified copies thereof.

Reversed and remanded.

1. Witnesses ⇐266

The right to cross-examine witnesses is implicit within right to confrontation provided by Sixth Amendment as applied through Fourteenth Amendment. U.S.C.A. Const. Amends. 6, 14.

2. Criminal Law ⇐662(1)
Witnesses ⇐266

Rights of confrontation and cross-examination are not absolute; confrontation and cross-examination are not essential where evidence bears indicia of reliability sufficient to insure integrity of fact-finding process. U.S.C.A.Const. Amends. 6, 14.

3. Criminal Law ⇐429(1)

Official written instruments are admissible as one of well-recognized exceptions to hearsay rule. Vernon's Ann.Civ.St. art. 3731a.

4. Criminal Law ⇐429(1)

Statute, which permits introduction in evidence of official public records or certified copies thereof, is applicable in criminal cases. Vernon's Ann.Civ.St. art. 3731a.

5. Criminal Law ⇐662(1)

In some circumstances, evidence within ambit of a recognized exception to hearsay rule is not admissible if it does not have indicia of reliability sufficient to insure integrity of fact-finding process commensurate with constitutional rights of confrontation and cross-examination. U.S.C.A.Const. Amends. 6, 14.

6. Criminal Law ⇐429(1)

Official records sought to be admitted under applicable statute are not admissible if they do not have sufficient indicia of reliability; it must be determined in each instance whether particular record is of such trustworthiness as to guarantee same protection provided by constitutional rights of confrontation and cross-examination; the particular record and its relationship to particular case in which it is offered are a part of circumstances to be considered in determining whether record has indispensable fundamental trustworthiness necessary for its admission into evidence. Vernon's Ann.Civ.St. art. 3731a; U.S.C.A.Const. Amends. 6, 14.

7. Criminal Law ⇐662(4), 986

In capital murder prosecution, error occurred in permitting, over objection, at punishment phase of trial, introduction of letters, reports, and documents from a federal parole officer's file pertaining to defendant's supervision and progress while on federal parole, where such evidence did not have indicia of reliability sufficient to insure integrity of fact-finding process commensurate with constitutional rights of confrontation and cross-examination and it was by no means clear that writings were official written instruments within meaning of

statute, which permits introduction in evidence of official public records or certified copies thereof. Vernon's Ann.Civ.St. art. 3731a; U.S.C.A.Const. Amends. 6, 14.

8. Criminal Law ⇐419(12), 429(1)

Even though official public records or certified copies thereof are admissible in evidence, that does not mean that ex parte statements, hearsay, conclusions and opinions contained therein are admissible. Vernon's Ann.Civ.St. art. 3731a.

9. Criminal Law ⇐429(1)

Statute, which permits introduction in evidence of official public records or certified copies thereof, contemplates admission of writings which are kept or made by an officer of United States, or an officer of a governmental subdivision of United States, in systematic administration of his office. Vernon's Ann.Civ.St. art. 3731a.

10. Criminal Law ⇐429(1)

For purposes of statute, which permits introduction in evidence of official public records, recordation pursuant to law of official matters relating to operations of a federal parole office or to particular parolees, about which there can be no reasonable dispute, is done in performance of functions of a government officer's official duties; but fact that a district parole office makes a practice of maintaining in a file any opinion or conclusion concerning a parolee within office's charge, regardless of its source, does not necessarily put those statements in class of records which are kept in performance of functions of a government officer's duties. Vernon's Ann.Civ.St. art. 3731a.

11. Criminal Law ⇐1208(1)

Trial court at punishment stage of a capital murder trial has wide discretion in admitting or excluding evidence; however, such discretion extends only to question of relevance of facts sought to be proved, and applicable statute does not alter rules of evidence insofar as manner of proof is concerned. Vernon's Ann.C.C.P. art. 37.071(a).

Ronald W. Aultman, Jerry J. Loftin and John M. Anderson, Fort Worth, All court appointed, for appellant.

Tim Curry, Dist. Atty., Marvin Collins, Joe Shannon, Jr. and Ronald G. Knight, Asst. Dist. Attys., Fort Worth, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION

DALLY, Judge.

This is an appeal from a conviction for the offense of capital murder. The punishment was assessed at death.

Appellant contends that the trial court erred in permitting, over objection, at the punishment phase of the trial, the introduction of letters, reports, and documents from a federal parole officer's file pertaining to appellant's supervision and progress while on federal parole. We agree and reverse the judgment.

Appellant was convicted for the murder of Fort Worth police officer Henry P. Mailloux. Appellant fatally shot Mailloux on the morning of November 29, 1975, after Mailloux stopped him for investigation of three armed robberies. The State introduced evidence identifying appellant as the perpetrator of armed robberies having occurred on November 18, 24, and 28, 1975, in Fort Worth. In addition, there was evidence that appellant had three prior felony convictions and therefore faced a possible life sentence as an habitual criminal should he be convicted again.

Appellant, who was shot during an exchange of gunfire with Mailloux, testified that he pulled his gun only after Mailloux shot him without provocation, and that the gun accidentally discharged during a subsequent struggle. Appellant fled from the scene following the shooting, and was arrested in San Antonio on December 1.

At the punishment phase of the trial, the State called J. M. McIntyre, a United States probation-parole officer for the Western District of Texas. McIntyre testified that, though he did not know appellant, his office in San Antonio had supervised appellant

while he was on parole. McIntyre further testified that a record had been kept of his office's contacts with appellant. Thereafter, the prosecutor attempted to elicit testimony from the witness, based on the records, as to the parole office's first contact with appellant. The court sustained appellant's objection on the grounds of hearsay and that the witness was "not the person in charge."

The prosecutor then asked the witness to remove from the file he had brought with him and clip together "certain records" which "pertain to contacts with this man" had by the parole office. These selected materials were marked as State's Exhibit No. 53 and a photocopy of the exhibit was offered in evidence. Appellant objected to the introduction of the exhibit on several grounds, among them that the proper predicate had not been shown for the admissibility of the exhibit, the exhibit was "hearsay upon hearsay letters to individuals—and letters as copies in the file," and the exhibit denied the rights of cross-examination and confrontation. This objection was sustained.

The prosecutor thereafter questioned McIntyre regarding the dates and reasons for the various contacts between appellant and his office. Appellant declined to cross-examine McIntyre, and the witness was excused.

Following a recess, McIntyre was recalled by the State. The materials he had removed from his file, now marked as State's Exhibit No. 54, were again offered in evidence. This time, the materials were admitted, over appellant's objection that he was being denied his right of confrontation. The prosecutor then had McIntyre identify each of the documents in the exhibit and read to the jury certain passages therefrom. During this testimony, appellant repeatedly objected on the grounds of hearsay and denial of confrontation.

State's Exhibit No. 54 consists of five documents. The first is a copy of a letter dated February 20, 1973, from Paul F. Cromwell, Jr., a United States probation officer in San Antonio, to Harry Ebberhardt, a counselor at a San Antonio drug abuse treatment center known as the Patrician Movement. Among other things, this letter refers to appellant's "aggressive nature," and quotes unnamed psychologists for the proposition that appellant has "a psychopathic personality" and "indications of paranoid schizophrenic behavior."

The second document is a copy of a letter dated September 26, 1973, from Robert E. Adamina, Jr., a United States probation officer in San Antonio, to Steve D. Johnston, Parole Executive, United States Board of Parole in Washington, D.C. This letter details appellant's performance while under the supervision of the San Antonio office, including his drug usage and inability to successfully participate in various rehabilitation programs. The writer of the letter concludes that "[t]hese events would indicate this individual's inability and/or desire to maintain a drug free status in the community and abide by the terms of his parole . . ." and recommends that appellant's federal parole be revoked.

The third document is a copy of a warrant application dated October 23, 1973, recommending that appellant's federal parole be revoked due to his admitted use of narcotics and failure to participate in treatment programs. The warrant application is signed by Steve D. Johnston, to whom the letter of September 26, referred to above, is addressed.

The fourth document is a copy of another letter to Steve D. Johnston. This letter is dated January 28, 1974, and is from Harvey H. Whitehill, a United States probation officer in San Antonio. In this letter, Whitehill refers to a conversation he had with appellant, during which appellant admitted being addicted to heroin.

The fifth document is a copy of a "Terminal Report" from Kerper House in San Antonio, signed by Bonnie J. Cromwell, Director. Kerper House is apparently another drug addiction treatment facility. A portion of this report reads as follows:

"*Program Progress*:

"Mr. Porter resided at the Kerper House for less than a week. He fixed with heroin three days after his arrival. He was a disruptive figure to the program and demonstrated 'paranoia' at a group counseling session. Due to his drug addiction and recidivist practices, progress was not made toward the accomplishment of any of the goals set for Mr. Porter.

"*Resocialization*:

"Mr. Porter's transition back into the community was not a success . . . . He expressed a complete feeling of 'helplessness' in regards to his drug usage. He plead [sic] for 'another chance' and seems to want badly to go straight; yet at the same time admitted to 'uncontrollable' behavior.

"*Prognosis*:

"Based on Mr. Porter's participation in our program and knowledge of his previous arrests and penitentiary record, it is felt by our Staff that his future looks grim . . . His employment, educational, social, and familial history is extremely poor and this is apparently due to his serious narcotic addiction. He demonstrates a number of serious mental and emotional handicaps. Rehabilitative rating is very poor."

On cross-examination, defense counsel elicited from the witness that his access to the writings in issue was equal to that of twelve other parole officers, eight secretaries, the Deputy Director of the San Antonio office, and the "Chief" of the Western District Parole Department in El Paso. When asked whether he personally kept the files, the witness stated that the "probation department is the custodian of records for the United States Courts as well as the Board of Paroles involving an individual under the supervision of either . . . ."

[1] The right to cross-examine witnesses is implicit within the right to confrontation provided by the Sixth Amendment to the Constitution of the United States as applied through the Fourteenth Amendment. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *Smith v. Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1967); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). The right to confront and cross-examine witnesses has also been held to be essential to due process and a fair trial within the provisions of the Fourteenth Amendment to the Constitution of the United States. E. g., *In Re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948) and *Chambers v. Mississippi*, supra.

[2] However, the rights of confrontation and cross-examination are not absolute. *Chambers v. Mississippi*, supra; *Mancusi v. Stubbs*, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); *Dutton v. Evans*, supra; *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). Confrontation and cross-examination are not essential where the evidence bears the indicia of reliability sufficient to insure the integrity of the fact finding process. *Dutton v. Evans*, supra; *Mancusi v. Stubbs*, supra; *Kay v. United States*, 255 F.2d 476 (4th Cir. 1958). Cf. *Chambers v. Mississippi*, supra; *California v. Green*, supra; *Berger v. California*, 393 U.S. 314, 89 S.Ct. 540, 21 L.Ed.2d 508 (1969).

[3] If the rights of confrontation and cross-examination were absolute, none of the exceptions to the hearsay rule would apply in criminal cases. In almost every criminal case, evidence is admitted under one of the exceptions to the hearsay rule. Official written instruments are admissible as one of the well recognized exceptions. They are admissible in this state under the provisions of Article 3731a, V.A.C.S., which reads, in pertinent part:

"Sec. 2. Any written instrument which is permitted or required by law to be made, filed, kept or recorded (including but not limited to certificate, written statement, contract, deed, conveyance, lease, concession, covenant, grant, record, return, report or recorded event) by an

> officer . . . of the United States . . . or of any governmental subdivision of any of the foregoing, or by his deputy or employee . . . in the performance of the functions of his office, shall so far as relevant, be admitted in the courts of this State as evidence of the matter stated therein . . ."

The State contends that the five documents in question are official written instruments, and were properly admitted under this statute.

[4, 5] Article 3731a, supra, is applicable in criminal cases. *Phillips v. State*, 538 S.W.2d 116 (Tex.Cr.App.1976); *Trevino v. State*, 464 S.W.2d 859 (Tex.Cr.App.1971); *Spencer v. State*, 164 Tex.Cr.R. 464, 300 S.W.2d 960 (1957); *Fite v. State*, 158 Tex. Cr.R. 611, 259 S.W.2d 198 (1953). However, in some circumstances, evidence within the ambit of a recognized exception to the hearsay rule is not admissible if it does not have the indicia of reliability sufficient to insure the integrity of the fact finding process commensurate with the constitutional rights of confrontation and cross-examination. *Chambers v. Mississippi*, supra; *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); *Berger v. California*, supra; *McDaniel v. United States*, 343 F.2d 785 (5th Cir. 1965); *United States v. Lipscomb*, 435 F.2d 796 (5th Cir. 1970); *Phillips v. Neil*, 452 F.2d 337 (6th Cir. 1971).

[6] This Court has previously recognized that evidence within the scope of the Business Records Act, Article 3737e, V.A.C.S., is not admissible if it does not have sufficient indicia of reliability. *Coulter v. State*, 494 S.W.2d 876 (Tex.Cr.App.1973); *Battee v. State*, 543 S.W.2d 91 (Tex.Cr.App.1976); *Sisson v. State*, 561 S.W.2d 197 (Tex.Cr. App.1978). The same rule is applicable to official records sought to be admitted under Article 3731a, supra. It must be determined in each instance whether the particular record is of such trustworthiness as to guarantee the same protection provided by the constitutional rights of confrontation and cross-examination. The particular record and its relationship to the particular case in which it is offered are a part of the circumstances to be considered in determining whether the record has the indispensable fundamental trustworthiness necessary for its admission into evidence. See e. g., *United States v. Lipscomb*, supra; *McDaniel v. United States*, supra; *People v. Aguilar*, 16 Cal.App.3d 1001, 94 Cal.Rptr. 492 (1971); *Johnson v. State*, 253 A.2d 206 (Del. 1969); *People v. Crant*, 42 Misc.2d 350, 248 N.Y.S.2d 310 (1964).

[7–10] The documents admitted in this case are letters, or copies of letters, which were kept or received in the District Parole Office in San Antonio. These letters contain hearsay upon hearsay, as well as opinions regarding appellant's mental and physical condition and his amenability to rehabilitation. The sources of these opinions are in most cases unnamed, and in no case are the authors or the unnamed sources shown to be competent to make the statements attributed to them. It defies reason to suggest that these letters, merely because they were collected in a file in a government office, have the indicia of reliability sufficient to insure the integrity of the fact finding process commensurate with the constitutional rights of confrontation and cross-examination. See *Estes v. State*, 162 Tex.Cr.R. 122, 283 S.W.2d 52 (1955); *Hartman v. Harder*, 322 S.W.2d 555 (Tex. Civ.App.—Amarillo 1959, no writ).

Texas Dept. of Public Safety v. Nesmith, 559 S.W.2d 443 (Tex.Civ.App.—Corpus Christi 1977, no writ), was a driver's license suspension case. The Department sought to prove the appellee's responsibility for the accident in question by introducing certain departmental records. The words of the Court in *Nesmith* are fully applicable to the instant case:

> "Tex.Rev.Civ.Stat.Ann. art. 3731a (Supp.1977), which permits the introduction of official public records or certified copies thereof in evidence, is an exception to the hearsay rule. See 24 Tex.Jur.2d. Evidence, Sec. 578. However, the contents of such records, when such records are offered in evidence, are subject to the same rules of evidence respecting relevancy, competency, or materiality as any

other evidence. *Smith v. Riviere*, 248 S.W.2d 526 (Tex.Civ.App.—Texarkana 1951, no writ). Therefore, even though the official public records or certified copies thereof are admissible in evidence, that does not mean that ex parte statements, hearsay, conclusions and opinions contained therein are admissible. Furthermore, the admissibility of the records does not authorize the consideration of any hearsay based on hearsay, or of any conclusion therein which is not shown to have been made by an official or employee of the Department who had personal knowledge of the facts upon which the conclusion is based. *Smith v. Riviere*, supra; *Texon Drilling Co. v. Elliff*, 216 S.W.2d 824 (Tex.Civ.App.—San Antonio 1948, writ ref'd n. r. e.)."

Not only did the admission of the writings in question deny appellant his rights of confrontation and cross-examination, it is by no means clear that the writings are official written instruments within the meaning of Article 3731a, supra. The special trustworthiness of official writings is found in the declarant's official duty and the high probability that the duty to make an accurate report has been performed. McCormick, Evidence, Sec. 315 (2d ed. 1972). This is implicit in the examples of official writings set out in Sec. 2 of the statute: certificate, written statement, contract, deed, conveyance, lease, concession, covenant, grant, record, return, report, or recorded event. From this it can be concluded that the act contemplates admission of writings which are kept or made by an officer of the United States, or an officer of a governmental subdivision of the United States, in the systematic administration of his office.

Clearly, the recordation pursuant to law of official acts, events, or matters relating to the operations of a federal parole office or to particular parolees, about which there can be no reasonable dispute, is done in the performance of the functions of a government officer's official duties. Cf. *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943); *Loper v. Andrews*, 404 S.W.2d 300 (Tex.Sup.1966). But the fact that a district parole office makes a practice of maintaining in a file any opinion or conclusion concerning a parolee within the office's charge, regardless of its source, does not necessarily put those statements in the class of records which are kept in the performance of the functions of a government officer's duties. To hold that such informal records are included within Article 3731a, supra, would pervert a rule "designed to facilitate admission of records which experience has shown to be quite trustworthy." *Palmer v. Hoffman*, supra, 318 U.S. at 113, 63 S.Ct. at 480.

It should also be noted that two of the writings introduced by the State, the letter dated September 26, 1973, and the warrant application dated October 23, 1973, were prepared with the specific view toward revoking appellant's federal parole, a quasi-criminal proceeding. Such utility as these writings possess relates primarily to such proceeding, and only incidentally to the systematic performance of the functions of the federal parole office. See *Palmer v. Hoffman*, supra; *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957); *Coulter v. State*, supra.

[11] In its brief, the State argues that the trial court had discretion to admit the writings in question under Article 37.071(a), V.A.C.C.P., which states:

"Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. *In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence.* This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death." (Emphasis added.)

It is true that the trial court at the punishment phase of a capital murder trial has wide discretion in admitting or excluding evidence. See *Hammett v. State*, — S.W.2d — (Tex.Cr.App. 1979); *Wilder and Armour v. State*, Tex.Cr.App. (No. 57,848, decided 1/31/79); *Hovila v. State*, 562 S.W.2d 243 (Tex.Cr.App.1978); *Brown v. State*, 554 S.W.2d 677 (Tex.Cr.App.1977); *Jurek v. State*, 522 S.W.2d 934 (Tex.Cr.App. 1975), affirmed, *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). However, this discretion extends only to the question of the *relevance* of the facts sought to be proved. Article 37.071(a), supra, does not alter the rules of evidence insofar as the *manner* of proof is concerned. While the facts contained in the documents in question may have been relevant to punishment, the manner in which the State sought to prove those facts denied appellant his constitutional rights of confrontation and cross-examination.

The judgment is reversed and the cause remanded.

Willie Frank JACKSON, Appellant,

v.

The STATE of Texas, Appellee.

No. 57682.

Court of Criminal Appeals of Texas, Panel No. 3.

March 28, 1979.

Defendant was convicted in the 196th Judicial District Court, Hunt County, Hollis D. Garmon, J., of aggravated robbery and he appealed. The Court of Criminal Appeals, Dally, J., held that notwithstanding defendant's failure to object, trial court's charge, which authorized jury to convict defendant of an offense not alleged in aggravated robbery indictment, constituted prejudicial error.

Reversed and remanded.

Criminal Law ⇐814, 1038.1(2)

Notwithstanding defendant's failure to object, trial court's charge, which authorized jury to convict defendant of an offense not alleged in aggravated robbery indictment, constituted prejudicial error. V.T.C.A., Penal Code §§ 29.02, 29.02(a)(1, 2), 29.03, 29.03(a)(1, 2).

James P. Hopkins, Dallas, for appellant.

Jerry Spencer Davis, Dist. Atty., Greenville, Robert Huttash, State's Atty., Austin, for the State.

Before DALLY, W. C. DAVIS and CLINTON, JJ.

OPINION

DALLY, Judge.

This is an appeal from a conviction for aggravated robbery; punishment was assessed at imprisonment for forty-nine years.

The indictment alleges that the appellant ". . . using and exhibiting a deadly weapon, namely a pistol, knowingly and intentionally threaten[ed] and place[d] Mrs. Kenneth Laucks in fear of imminent bodily injury and death . . ."

However, in addition to the means of committing robbery as it is alleged in the indictment, the court's charge authorized the appellant's conviction if the jury found the appellant ". . . recklessly caused bodily injury to the owner . . ." and ". . . caused serious bodily injury to Mrs. Kenneth Laucks . . ."

The indictment only alleges the offense under the provisions of V.T.C.A. Penal Code Sections 29.02(a)(2) and 29.03(a)(2), but the court's charge in addition to allowing a conviction under these provisions instructs

Relevant Constitutional and Statutory Provisions

Fifth Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment to the Constitution of the United States

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis

forma pauperis. The undersigned were appointed to represent petitioner in the United States Court of Appeals for the Fifth Circuit pursuant to 18 U.S.C. §3006A and continues to represent him in this Court.

Petitioner's petition for a writ of certiorari is being filed with this motion.

Dated: New York, New York
November 29, 1983

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of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 United States Code
§2254(d)

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed correct, unless applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

MR. ADCOCK: Yes, Your Honor. Thank you.

MR. TINKER: We do request that any witnesses that may be in attendance -- I recognize that they won't all be here this morning because of the logistic problem, but any witnesses, we do request they be placed under the Rule, and if they would be summoned in, it might be appropriate at this time.

THE COURT: Okay. Bring out the Jury.

MR. TINKER: May I just make one other observation? I think it is something else we should talk about. I have been informed by my co-Counsel, Mr. Anderson, that this morning, or sometime, Mr. Adcock has said that he had discovered some evidence of psychiatric problems as far as our client is concerned. I'm not sure what that was or what it is, and we will say to the Court that in my looking through, and I thought I looked through that file there thoroughly, that I saw nothing of that kind in the files that I saw, and if there -- I feel like it is appropriate for some expression concerning that be made into the record here.

MR. ADCOCK: All right. Your Honor, when Mr. Tinker very adroitly pointed out what particular file in our file, there was this "Miscellaneous" file, that last night we went to our box of files

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and we did find it. In looking through it, we found certain indications of the officer's law enforcement, and his degrees from TCU ---

THE COURT: His what?

MR. ADCOCK: Degrees from TCU.

MR. TINKER: You are talking about the officer?

MR. ADCOCK: Yes, and we did see a blurb in here of one sentence, and I brought it with me this morning, and I did inform the Court, I believe, and Mr. Anderson, in the Court's chambers, as to this; is that correct?

THE COURT: That is correct.

MR. ADCOCK: If you will give me a few minutes to find it, I will try to call it to their attention exactly as we have it.

MR. TINKER: Your Honor, while Counsel is looking through his file to discover or find this point in the record, the evidence may be revealed -- I am informed, and I will ask the Court if it has a recollection that at the last trial of this case, that a request was made by the prosecution to see the reports concerning the personnel file from the defense. The defense lawyers made a request to see the personnel file of the officer and that was denied. The only thing I would do -- may the Court

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permit us to rely, if necessary, on what the record reflects at the last trial concerning that report?

THE COURT: Yeah. I don't have any recollection of it.

MR. TINKER: One way or the other?

THE COURT: Yes.

MR. ADCOCK: Your Honor, we have found it. It is an incomplete report that is not signed, and it is entitled "Social History," where the Defendant was sent to Austin to a hospital, that he escaped; and then further, under "Military History," something as to hallucinations. At this time, I hand it to Counsel, and point this out in the "Social History" part of it. It is from the same file that Mr. Tinker referred us to concerning the shooting of a burglar back in 1973. I might also report that the burglar at that time, according to the record, was carrying a seven-inch pipe, a crescent wrench.

MR. TINKER: May the record reflect that the report is talking about "Military History." I don't see a date on it, but it is my understanding that this is a document that was introduced at the hearing on punishment at the last proceeding; is that the recollection of the prosecution?

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MR. ADCOCK: Counsel, I don't know. That document has been in the custody of the Court Reporter and I haven't read them, but I assume it is. I will go along with you on that.

MR. TINKER: It reflects -- it says "Military History" and, again, undated. One of those lines says the Defendant was sent to the State Hospital at Austin, Texas from Waterville State School for Boys because he had hallucinations of seeing his father and speaking to him. Is that all the record you may have in regard to his psychiatric and psychological problems as far as the Defendant?

MR. ADCOCK: That and where he ran away from the hospital. That is all I know.

MR. TINKER: I just wanted to make that inquiry.

THE COURT: Okay. Is that all?

MR. ADCOCK: Yes.

MR. TINKER: Your Honor, one further thing. I do request -- I see there are at least three members of the news media present. We can only assume from that that there may be news casts or newspaper coverage of the proceedings in this case. I would at this time request that from the time the trial starts that the Jury be sequestered.

THE COURT: That is overruled. Okay. Bring

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MORNING SESSION

[May 24, 1979 - Thursday]

THE COURT: Okay, are we ready for the Jury?

MR. LINEBARGER: We would like, number one, to request, Your Honor, our Motion In Limine. We feel that it was violated yesterday as the Court ordered the defense not to go into that act of shooting without first taking it up outside the presence of the Jury, and it was done anyway, in violation of the Motion In Limine.

THE COURT: No.

[The following proceedings are held outside the presence of the Jury.]

THE COURT: Well, your Motion In Limine is still in effect.

MR. TINKER: I understand that, and I intend to abide by it, or I felt that I was within the ruling of the Court when I -- there are lots of other questions that I would have liked to ask, but for the ruling of the Court, and I didn't do it.

Your Honor, at this time, we do have one matter to bring up. It is kind of an alternative request. Yesterday, and last night it was, I got a little concerned about the report that was brought to our

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attention, and the Court's attention, concerning some, perhaps, psychiatric or psychological problems on the part of the Defendant while he was in the service.

I will tell the Court a little bit before I make a request that one of the hazards I recognize in representing someone who is accused of a Capital Murder is the problem that if a psychiatrist is called in for an examination, there is a possibility that although we wouldn't know ahead of time what he would say, that you are developing evidence for the use of the prosecution in the hearing on punishment if the case gets that far. That is why yesterday I didn't say anything about requesting a psychiatric examination.

So, the request that I now make to the Court in that light is that the Court permit me, and I can, get a psychiatrist to examine Henry, but I will do it only, only if I can have a ruling from the Court that whatever the results of that examination, that it cannot be used in any hearing on punishment, as far as this case is concerned. And, of course, I could not, as Mr. Porter's attorney, take a chance of having him examined by a psychiatrist if there is that possibility, however slim, that there was something

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that the psychiatrist might conclude or discover that would be detrimental to our client. So, I ask a ruling of the Court that we be permitted to have Henry examined by a psychiatrist and that whatever the results of those findings are, would only -- could only be used with regard to any determination by the Court that the -- concerning his ability to stand trial and/or any possible defense of insanity. I don't say that we have one, but I don't know what the psychiatrist will say. If the Court will not permit us to have the psychiatrist examine him with the limitations that I have requested, then we, of course, will not -- we withdraw our request for that examination and, as a matter of fact, if the Court -- and would refuse that kind of examination, or instruct our client not to talk to any psychiatrist.

THE COURT: Well, that is what they did before in Fort Worth. They instructed him not to talk to the psychiatrist.

MR. TINKER: Well, I'm just saying that it is my position that under Pate versus Robinson we have a right to have some kind of examination made without the hazard of causing our client to get death penalty at some future time, and I just request the Court to enter an order that we can and it will not be

admissible at the hearing on punishment; if the Court cannot enter that order, that the record reflect my feelings in that regard.

MR. ADCOCK: Your Honor, I think defense Counsel is trying to place the Court in a position where he is damned if he does and damned if he doesn't. I believe under the set of facts that is confronting the defense Counsel and the Court at this time, it --- is the case law is rather replete, and perhaps there should be a Court appointed psychiatrist to examine him. I don't think that Counsel can then tell the Court even before he knows what the results are, "Well, if they are such and such a way, I'm bound by them." I think that report then becomes part of the papers of the case.

Now, we are a long way from this stage at this time as to any punishment. I think that question can arise at some other time. But, I think the way the case law is that both the Court and the defense Counsel should have him examined.

THE COURT: And what?

MR. ADCOCK: He should be examined if they so feel that there is a possibility.

THE COURT: But you feel like the State is entitled to use anything they find?

MR. ADCOCK: Yes, sir, but I don't think -- I would like to brief that for the Court. What I'm saying now is the question that he is proposing is a moot question at this time because he does have a -- if he wants to have him examined, he must follow the law of the State, and I think the laws are that the competency or insanity at the time of the commission of the crime is a question of fact during the guilt or innocence stage. I think he is trying now to come in and bind us further as to the punishment stage, and I think we haven't reached that stage yet.

THE COURT: Well, I don't follow what you are saying, but I will deny the request. If you want to let it be the record of the Court and used by either side, I will let him be examined.

MR. TINKER: Your Honor, I will clearly let the record reflect that I will refuse that offer if the Court is not going to limit the findings of the doctor to the issues as to his present compentency to stand trial or his insanity at the time of the crime.

THE COURT: No. Okay, bring in the Jury.

[The Jury is seated in the Jury box and the following proceedings take place.]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

Supreme Court, U.S.
FILED
NOV 29 1983
Alexander L. Stevas, Clerk

NO.

HENRY MARTINEZ PORTER,

Petitioner,

83-5809

v.

W.J. ESTELLE, JR., DIRECTOR,
Texas Department of Corrections,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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IN THE

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United States Court of Appeals
For the Fifth Circuit

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Petitioner Henry Martinez Porter moves this Court for an order permitting him to proceed in forma pauperis with his petition for a writ of certiorari seeking review of a judgment of the United States Court of Appeals for the Fifth Circuit entered on July 18, 1983, pursuant to the provisions of 28 U.S.C. §1915 and Rule 46 of the Rules of this Court.

Petitioner is a Texas state prisoner presently confined under a sentence of death. He is indigent and has neither the funds nor financial resources either to retain counsel or to pay the costs or filing fees in this Court. At all stages of the prior criminal proceedings in the State Courts of Texas he has been assigned counsel. At all stages of subsequent habeas corpus proceedings in the federal courts he has been granted leave to proceed in

Supreme Court, U.S.
FILED
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CLERK

NO. 83-5808

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

HENRY MARTINEZ PORTER,

Petitioner

V.

DAN V. McKASKLE, ACTING DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

WHETHER THE COURT BELOW CORRECTLY HELD THAT THERE WAS NO WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) ERROR BY THE TRIAL COURT'S EXCLUSION OF SIX VENIREMEN, EACH OF WHOM UNAMBIGUOUSLY AND UNEQUIVOCALLY ASSERTED IRREVOCABLE OPPOSITION TO IMPOSITION OF THE DEATH PENALTY.

II.

WHETHER PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO ORDER PETITIONER EXAMINED BY A PSYCHIATRIST WHERE THERE WAS NO EVIDENCE TO RAISE A QUESTION OF COMPETENCY TO STAND TRIAL.

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NO. 83-5808

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1983

HENRY MARTINEZ PORTER,

Petitioner

V.

DAN V. McKASKLE, ACTING DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, an files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Appeals below is published at 709 F.2d 944 (5th Cir. 1983), reh. denied, 715 F.2d 577 , and is reproduced in the appendix to the Petition for Writ of Certiorari, 1a-17a. The unpublished memorandum and order of the district court is reproduced in the appendix to the Petition for Writ of Certiorari, 18a-26a. The en banc opinion of the Texas

Court of Criminal Appeals is reported at 623 S.W.2d 374 (Tex.Crim.App. 1981), and is reproduced in the appendix to the Writ of Certiorari, 29a-41a.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1254(1) and 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner bases his claim upon the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Petitioner's statement of the course of proceedings an disposition below is correct.

B. Statement of Facts

The evidence presented relevant to Petitioner's competence to stand trial is best summarized by the court below, 709 F.2d 944, 952-53, and by the Texas Court of Criminal Appeals, 623 S.W.2d 374, 380.

SUMMARY OF ARGUMENT

There are no special or important reasons to review this case. The issues presented involve only the application of well-settled constitutional principles to the facts involved herein.

The court below, correctly applying the guidelines established by this Court in Pate v. Robinson, 383 U.S. 375 (1966) and Drope v. Missouri, 420 U.S. 162 (1975), found no evidence in the record raising a bona fide doubt as to Petitioner's competency, so as to implicate his constitutional rights to a fair trial. Petitioner bases his claim of a history of mental disorders on a twenty-year-old probation report, containing a reference to one juvenile hospitalization. No other

evidence as to competency was presented. There was no violation of Estelle v. Smith, 451 U.S. 454 (1981), as no psychiatric testimony was offered at either phase of his trial.

The record in the instant case reflects no error under Witherspoon v. Illinois, 391 U.S. 510 (1968). Each of the six veniremen excluded for cause would have been unable to serve as fair and impartial jurors, based upon their opposition to the imposition of the death penalty. As such, no constitutional error is presented and this Court should decline to review this case.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on the writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special or important reasons therefor. Petitioner has advanced no special or important reason in this case and none exists. Further, the Petition for Writ of Certiorari does not raise unsettled questions of law. The issues addressed involve nothing more than the application of well-settled constitutional principles to the facts of this case. Thus, no important question of law is presented herein.

II.

THE COURT BELOW CORRECTLY HELD THAT THERE WAS NO WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) ERROR BY THE TRIAL COURT'S EXCLUSION OF SIX VENIREMEN, EACH OF WHOM UNAMBIGUOUSLY AND UNEQUOVICALLY ASSERTED IRREVOCABLE OPPOSITION TO IMPOSITION OF THE DEATH PENALTY.

In Witherspoon, this Court held, inter alia, that in a capital trial, no veniremen could be excluded for cause for his views regarding the imposition of the death penalty unless he

made unmistakably clear that he would "automatically vote against the imposition of capital punishment without regard to any evidence that might be developed" at trial. 391 U.S. at 522-23 n.21. See also Boulden v. Holman, 394 U.S. 478 (1969); Davis v. Georgia, 429 U.S. 122 (1976); Adams v. Texas, 448 U.S. 38 (1980). As the court below held, the record reflects that each of the challenged veniremen were properly excluded because he or she would have been unable to serve as a fair and impartial juror consistent with Witherspoon principles.

Venireman Susan Jean Pace Herndon (Tr. 273-76), unambiguously and unequivocably stated five times that if selected as a juror, she would automatically vote against the imposition of the death penalty regardless of the evidence (Tr. 274-75). In direct response to defense counsel's question as to whether she could be persuaded to agree that there are some cases in which the death penalty is a possibility, she responded that she could not (Tr. 275). After further inquiry into the basis of Herndon's unequivocable resolve to vote against the death penalty in all circumstances, Hernondon responded affirmatively to defense counsel's broad and general question that she could do her duty as a juror (Tr. 275).

The trial court sustained the state's challenge for cause, to which defense counsel objected (Tr. 276). In response thereto, the prosecution succinctly pointed out that the general question asked of doing her duty as a juror had not included "[that] if it meant sentencing a man to death, could you follow that duty?" (Tr. 276). Defense counsel, supplied with the omitted language, declined to pursue the inquiry.

Petitioner contends that because the venireman, in response to a broad and general question which informed the juror of nothing, answered that she could do her duty and serve as a juror, the exclusion violated Witherspoon, in spite of the

venireman's previous five unambiguous and unequivocal responses that she would automatically vote against the death penalty, regardless of what occurred at trial. The court below found this contention untenable, expressly noting:

> In view of Herndon's repeated, firm, and unequivocal statements of irrevocable imposition of the death penalty under any circumstances, we are unable to say her limited reply that "she could do her duty as a juror" indicated any vacillation or equivocation in her previous statement of unalterable opposition to the imposition of the death penalty.

Porter v. Estelle, 709 F.2d at 948. Hernondon's responses were sufficient to permit her exclusion consistent with Witherspoon principles.

Venireman Zenon Martinez first stated that he had no objection to the range of punishment for capital murder (Tr. 555), but immediately thereafter stated that he could not sentence a man to death if the facts so warranted (Tr. 555); that based on his personal beliefs against the death penalty, he would vote against the death penalty regardless of the facts; and that his vote would be committed before he even heard the facts (Tr. 555-57). The prosecutor then explained to Martinez that capital jurors would have to answer statutory special issues, and that if all were answered in the affirmative, an automatic death sentence would be imposed, but if any special issue were answered in the negative, then punishment would be a life sentence (Tr. 557-591. Martinez responded that he would automatically vote "no" to one of the special issues to preclude imposition of the death sentence and that he was irrevocably committed to vote against the imposition of the death penalty (Tr. 559). The state made a challenge to the venireman, and defense counsel was permitted to examine him. Counsel then explained that citizens of the community have an important duty to serve a jurors if they qualify and inquired whether Martinez was willing to do his duty

as a citizen in serving on a jury, to which Martinez responded that he was (Tr. 561). Counsel then explained that jurors were bound to follow the law (Tr. 561); that some people may disagree with the law but that they could set aside their personal feelings and follow the law anyway (Tr. 562). Defense counsel then asked whether he could do his duty as a citizen and follow the law, to which Martinez responded that he could (Tr. 562). Defense counsel then specifically asked Martinez:

> Q: What I want to ask you is: Can you set aside your expressed convictions and your disbelief in the death penalty and do your duty as a citizen on this Jury?
>
> A: No, sir.

(Tr. 562). Thus, Martinez expressly stated that while generally he could set aside personal feelings and follow the law, he was unwilling to do this in a death penalty case. At this point, defense counsel began inquiring into what effect the death penalty would have on his deliberations, to which Martinez responded he would have it on his conscience and would worry about it (Tr. 563-64). The trial court finally sustained an objection to defense counsel's repetitive questioning and excused the venireman (Tr. 563-64).

Thus, the record clearly reflects that Martinez maintained that he would automatically vote against the imposition of the death penalty regardless of the facts. Although he could "do his duty" a citizen or juror, when his "duty" as a juror in a capital case was explained to him, i.e., that he would have to follow the law, he unequivocally asserted that he could not "set aside [his] expressed convictions and [his] disbelief in the death penalty and do [his] duty as a citizen on this Jury" (Tr. 562). Thus, his exclusion did not violate Witherspoon. See Porter v. Estelle, 709 F.2d at 949.

Venireman Alonzo Vaughn five times clearly and unequivocally testified that he would automatically vote against the imposition of the death penalty, no matter what the facts or circumstances revealed (Tr. 610, 611, 613). Upon questioning by defense counsel, however, he then stated that he could serve as a juror and was willing to listen to the evidence and "imagined" he could vote based on the evidence (Tr. 615-16). When the effect of affirmative answers to the special issues submitted pursuant to Article 37.071, V.A.C.C.P. was explained to him, however, he retracted this statement and unequivocably stated that he would automatically answer the special issues "no," knowing that an affirmative answer would result in the imposition of the death penalty (Tr. 618-19). Thus Vaughn unequivocally maintained that he would automatically vote against the imposition of the death penalty, and when the effect of his answers to the special issues was explained to him, he maintained that he could not answer in such a way that death would result. As such, his exclusion did not violate Witherspoon. See Porter v. Estelle, 609 F.2d at 949.

Venireman Rice five times testified that she would automatically vote against the imposition of the death penalty no matter what the trial revealed (Tr. 1098, 1100, 1102, 1103) and maintained that she would be compelled to answer the special issues "no" because affirmative answers would result in the imposition of death (Tr. 1100). When she once expressed uncertainty about whether she could base her verdict on the evidence adduced, the trial court overruled the state's challenge, stating "I think this is exactly what Witherspoon had in mind." (Tr. 1107-09). Upon further questioning, however, Rice then maintained that she could not be fair to both sides (Tr. 1110) and then twice maintained that she was irrevocably committed to vote against the death penalty, regardless of the facts and circumstances (Tr. 1111). Thus, although at one point

during the middle of the examination Rice stated that she did not know whether she could "do [her] duty and make whatever decision, based upon the evidence before [her] that the law might require" (Tr. 1107-08), her final responses that she could not, and would automatically exclude the death penalty, were unequivocal and unambigous. Petitioner's assertions that the venireman remained "mixed up" and equivocal are based upon a highly selective reading of the record, in which the venireman's final responses are ignored. Because Rice fell within that narrow group of veniremen discussed in Witherspoon, her exclusion was constitutionally permissible. See Porter v. Estelle, 709 F.2d at 948-49.

Venireman Esiquio Cantu five times maintained that he would automatically vote against the imposition of capital punishment, regardless of what the trial might reveal, that he was committed before trial to do so and that he would answer the puinshment questions "no." (Tr. 822, 823). While he once stated that he could listen to the facts and make a decision based thereon (Tr. 825), subsequent questioning by defense counsel revealed that this was in regard to guilt or innocence, not punishment (Tr. 825 L. 21-25). Further, in later response to this question, the venireman indicated that he was uncertain whether he could make a decision regarding guilt based upon the evidence (Tr. 826). Thus, in addition to the venireman's clear and unambiguous inability to consider the full range of punishment, it appears also that he could not be fair and impartial on the issue of guilt, another constitutionally permissible ground for exclusion. See Lockett v. Ohio, 438 U.S. 586 (1978).

Petitioner, once again, bases his argument that the venireman simply was unsure of his position on the death penalty on a selective and rather misleading representation of the record. The record clearly reflects that the venireman's final

uncertainty was in response to defense questions concerning the venireman's ability to decide the question of guilt or innocence, not punishment (Tr. 825-26). Significantly, it further reflects that defense counsel made no effort to further question the venireman concerning the application of his views to the death penalty. Thus, the record is clear that the above questioning only related to a finding of guilt. Cantu's uncertainty about rendering any decision as a juror related solely to guilt, and, indeed, had nothing to do with Cantu's position on the death penalty, defense counsel having abandoned questions relating to the "effect" of the death penalty on Cantu's jury service (Tr. 824-25). Thus, Cantu's' uncertainty regarding whether he could even vote to convict in no way rendered ambiguous or equivocal his previous five firm assertions that he would automatically vote against the imposition of capital punishment, no matter what the trial revealed, and would have to answer the special issues "no" because of his commitment. His exclusion was consistent with constitutional principles. See Porter v. Estelle, 709 F.2d at 949.

Finally, venireman Prue six times clearly and unequivocally testified that she would automatically vote against the imposition of capital punishment, regardless of the evidence revealed at trial, and that she would answer at least one of the special issues "no" to avoid the imposition of the death penalty (Tr. 1166, 1167, 1168, 1169). Although she once was asked whether she could "do [her] duty as a citizen," (Tr. 1170), as the prosecutor correctly pointed out in his objection to defense counsel's general and vague question, defense counsel's question never explained what this "duty" was or that it might entail returning a verdict which would result in death (Tr. 1170-71). Thus, the incomplete question of defense counsel was properly sustained. Given the opportunity to rephrase the question, and

indeed supplied by the prosecutor with the missing element, defense counsel declined to ask any further question. Thus, Prue's earlier unambiguous and unequivocal responses to the Witherspoon inquiry stand. Accordingly, her exclusion was not erroneous. See Porter v. Estelle, 609 F.2d at 949.

As the court below found, the exclusion of each of these veniremen presents no Witherspoon violation. As such, this Court should decline review.

III.

PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE TRIAL COURT'S REFUSAL TO ORDER PETITIONER EXAMINED BY A PSYCHIATRIST WHERE THERE WAS NO EVIDENCE TO RAISE A QUESTION OF COMPETENCY TO STAND TRIAL.

This Court announced in Drope v. Missouri, 420 U.S. 162 (1975) and Pate v. Robinson, 383 U.S. 375 (1966), that a separate procedural due process right to a competency hearing exists whenever the facts or events presented to the trial court raise a bona fide doubt as to the defendant's competency to stand trial. Whenever such a doubt is raised by the evidence, the trial court must, sua sponte, conduct an inquiry into the defendant's mental competency. The test for determining a defendant's mental competency was articulated by this Court in Dusky v. United States, 362 U.S. 402 (1960):

> [W]hether [the defendant] has sufficient present ability to counsel with his lawyer with a reasonable degree of rationale understanding -- and whether he has a rational as well as factual understanding of the proceedings against him.

While no general standard for the nature or quantum of evidence necessary to trigger a competency procedure has been articulated by this Court, three factors have been found to be relevant in assessing competency: (1) the existence of a history of irrational behavior, (2) prior psychiatric opinion, and (3) the defendant's demeanor at trial. Drope v. Missouri, 420 U.S.

at 180. Applying the Pate-Drope guidelines to the facts of the case, the court below held that there was no evidence presented to the trial court raising a bona fide doubt as to Petitioner's competency and thus, the trial court had no constitutional duty to order a psychiatric examination and conduct an inquiry into Petitioner's competency to stand trial. (See Porter v. Estelle, 709 F.2d at 949-56 for a complete discussion of the evidence evaluated under the focus of the Drope guidelines.)

The court below carefully considered Petitioner's claim that the trial court refused to conduct the competency inquiry on the basis of defense counsel's refusal to allow the results to be used at the penalty phase, before rejecting it.

> The petitioner Porter nevertheless argues that the rejection of his constitutional claim on this basis is improper, because the state trial judge did not deny Porter a competency examination on such basis but, rather, because Porter's counsel refused to consent to its (possible) misuse against him in the penalty hearing. Porter also points out that the state conceded the need for a competency examination under existing law, so that if Porter had other showing to make (none has been suggested, however), the state's concession deprived him of that opportunity.
>
> Examination of the state trial judge's ruling and the colloquy preceding it does not indicate any agreement on this part that further psychiatric examination was indicated, merely a willingness to order one if the defendant requested one and an unwillingness to issue an order at that time as to its hypothetical future use in the penalty proceeding. Neither in the original federal habeas petition, see R.I., p. 54 at 61-62, nor at any other stage in the present state prosecution, post-conviction review, or federal habeas proceedings, has the contention been made that Porter was in fact incompetent to stand trial -- the complaint made is limited to whether the trial judge improperly inhibited Porter's Pate-Drope right to further inquiry as to his competency by refusing to order a competency examination subject to its non-use in the penalty proceedings. For purposes of federal habeas review, however, the predicate issue for affording Porter habeas relief depends upon whether the record as known to the trial judge raised a bona fide doubt as to Porter's

competency so as to implicate constitutional rights to a fair trial under Pate-Drope principles. For the reasons stated, no such predicate constitutional deficiency is shown in Porter's state trial, and we are unwilling to agree that the state's mistaken concession as to the need for a competency examination somehow created constitutional error where none is shown.

CONCLUSION

For these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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